SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~883~~ 53

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, PETITIONER,

vs.

THE FAFNIR BEARING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 1-CA-4077

146 NLRB No. 179

October 6, 1964

THE FAFNIR BEARING COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD—
Filed October 9, 1964

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The Fafnir Bearing Company (the Company) files this petition pursuant to the provisions of Section 10(f) of the National Labor Relations Act, 29 U.S.C. Section 160(f), for a review of the decision and order of the National Labor Relations Board (the Board) entered at Washington, D. C. on May 13, 1964 finding that the Company had violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act (the Act) by refusing to permit an industrial engineer employed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 133, UAW, AFL-CIO (the Union) to perform independent time studies, in production areas of the Company's plant, during working hours, on jobs involved in certain piece-work price grievances arising under the parties' collective bargaining agreement.

In support of this petition, the Company respectfully represents as follows:

I.

Jurisdiction

The Company is a corporation organized and existing under the laws of the State of Connecticut and having its principal office and place of business in the Town of New Britain, County of Hartford, in said State, where it is engaged in the business of the manufacture, sale and distribu-[fol. 2] tion of ball bearings and related products. Further, the alleged unfair labor practices were alleged to have been committed or engaged in within the Second Circuit and thus within the jurisdiction of this Court. This Court therefore has jurisdiction of this petition by virtue of said Section 10(f) of the Act.

II.

Statement of the Proceeding

This is a proceeding on a complaint issued by the General Counsel of the Board, dated May 7, 1963, alleging a violation by the Company of Sections 8(a)(5) and 8(a)(1) of the Act. The basic substance of the allegations of the complaint are contained in paragraphs 10, 11 and 12 thereof wherein General Counsel alleges that since on or about February 7, 1963, the Company has refused the Union's request for permission to conduct its own time studies relative to certain piece-work prices that are the subject of certain grievances being processed by the Union, that said time studies "are relevant to the Union's evaluation of the merits of said grievances and would assist it in intelligently determining whether arbitration was advisable", and that such action on the part of the Company constitutes a refusal to bargain in good faith and hence is a violation of said Sections of the Act. Hearing on said complaint was had before Trial Examiner James V. Constantine who, on September 26, 1963, issued his Decision, as of record will appear, finding that the Company had not refused to bargain in good faith by denying access to production areas of the Company's plant during working hours to a Union indus-

trial engineer for the purpose of making independent time studies of the disputed operations, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel of the Board and the Union filed exceptions to the Trial Examiner's Decision and briefs in support thereof, and the Company filed a brief in support of the Trial Examiner's Decision and cross-exceptions and a brief [fol. 3] in support of such cross-exceptions. The Board issued its Decision and Order as aforesaid overruling the decision of the Trial Examiner, as will appear of record. Thereafter, on June 10, 1964, the Company filed a motion for reconsideration and a motion to reopen the record with the Board. General Counsel of the Board and the Union filed objections to the granting of such motions and, on August 20, 1964, both of said motions were denied by the Board.

III.

Assignments of Error

The Company, as a basis for review, makes the following assignments of error:

1. The Board's holding that the Union has an absolute, statutory right of access to the production areas of the Company's plant during working hours, for the purpose of making independent time studies of disputed operations by its own expert to investigate and verify time study data already furnished to the Union by the Company, is contrary to law.

2. The Board's holding that the Company refused to bargain in good faith by denying access to production areas of the Company's plant during working hours to a Union industrial engineer, for the purpose of making independent time studies of disputed operations to investigate and verify time study data already furnished to the Union by the Company, is contrary to law in view of the history of the bargaining relationship between the parties, the availability to the Union of the Company time study data, the stand-

ard set forth in the parties' collective bargaining agreement for testing a piece-work price, the parties' contractual grievance procedure, the failure on the part of the Union to exhaust those procedures and the agreed-upon right of access of an arbitrator to ultimately resolve the disputes.

3. The Board erred in holding that the Trial Examiner committed no prejudicial error in overruling the Company's motion to dismiss the complaint, dated August 13, 1963, [fol. 4] thus failing to impose upon General Counsel the burden of proving that denial of plant access during working hours to a Union expert for independent time studies of disputed operations constituted an unreasonable impediment upon the Union's exercise of its statutory rights as the employees' bargaining representative.

4. In holding that the Trial Examiner committed no prejudicial error in overruling the Company's motion to dismiss the complaint, dated August 13, 1963, the Board, contrary to law, shifted to Respondent the burden of proving that denial of plant access during working hours to a Union expert for independent time studies of disputed operations did not constitute an unreasonable impediment upon the Union's exercise of its statutory rights as bargaining representative.

5. The Board's finding that the Company time study data furnished to the Union and the means afforded by the parties' contractual grievance procedures were insufficient to enable the Union to make a decision as to whether to take the four grievances in issue to arbitration and thus properly to perform its function as the employees' bargaining representative, and that access by a Union industrial engineer to production areas of the Company's plant during working hours was necessary for such purpose, is not supported by substantial evidence on the record considered as a whole.

6. The Board's finding that the Company failed to prove that access to the production areas of the Company's plant would be disruptive of production and discipline is not sup-

ported by substantial evidence on the record considered as a whole.

7. The Board erred in failing to grant the Company's motion to reopen the record to introduce expert testimony from a qualified industrial engineer to the effect that (i) without plant access and independent time studies by a Union expert, alternative sources of information were sufficient to enable the Union to make an intelligent decision as to whether the four grievances should have been taken to [fol. 5] arbitration, and (ii) plant access by a Union industrial engineer would unduly interfere with production operations and discipline, because the complaint and proceedings had thereon until the commencement of the hearing on August 13, 1963 only gave the Company notice that it was the claim of General Counsel that such independent time studies "are relevant to the Union's evaluation of the merits of said grievances and would assist it in intelligently determining whether arbitration was advisable", not that independent time studies were necessary to enable the Union properly to perform its duty as bargaining representative.

8. The Board erred with respect to the breadth and scope of paragraph 1(a) of its Order which requires the Company to cease and desist from refusing to permit the Union to perform independent time studies, through its own experts, on jobs involved in grievances arising under the parties' collective bargaining agreement in that such order should clearly be limited to the jobs involved in the four piecework price grievances in issue, and unless access for such purpose is otherwise contrary to law, to jobs involved in identical or substantially similar grievances where such independent time study for the purpose of a Union decision as to whether a grievance should be arbitrated is demonstrably necessary because all alternative sources of information available to the Union have been exhausted and are insufficient.

IV.

Prayer for Relief

Wherefore Petitioner prays for a review of the Findings, Decision and Order of the National Labor Relations Board and that:

1. A copy of this petition be served upon the Board;

2. Said Findings, Decision and Order of the Board be in all respects set aside, and the complaint against the Company dismissed;

[fol. 6] 3. The Board be ordered to reopen the record for the purposes specified in paragraph III, 7 above;

4. The Company shall have such other and further relief as may be just and proper in the circumstances and which may to equity appertain.

Robinson, Robinson & Cole, By Lucian E. Baldwin, Attorney for Petitioner, 750 Main Street, Hartford, Connecticut.

[fol. 7] [File endorsement omitted]

[fol. 8]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29243

THE FAFNIR BEARING COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION FOR REVIEW, AND CROSS-PETITION FOR ENFORCEMENT OF, AN ORDER OF THE BOARD—Filed October 27, 1964

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The National Labor Relations Board, by its Assistant General Counsel, pursuant to the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), files this answer to the petition for review of its order issued on May 13, 1964.

1. The Board admits the jurisdiction of this Court.

2. With respect to the statements contained in paragraph II of the petition for review, the Board prays reference to the certified record, which will be filed, for a full and accurate recital of the facts and procedure in this case.

3. The Board denies each and every assignment of error contained in paragraph numbered III, and subparagraphs thereunder, of the Petition.

4. Further answering said petition the Board says that the proceedings had before it, the findings of fact, conclusions of law and order of the Board were and are in all respects valid and proper under the National Labor Rela-

tions Act and, pursuant to Section 10(e) of the Act, the Board respectfully requests this Court to enforce the order of the Board issued against the petitioner on May 13, 1964, in Case No. 1-CA-4077.

5. Pursuant to Rule 13(g) of this Court, the Board will certify and file with this Court a certified list of all the materials containing the record in the proceeding before it in Case No. 1-CA-4077.

[fol. 9] Wherefore, the Board prays that this Court cause notice of the filing of this Answer and Cross-Petition for Enforcement to be served upon petitioner and that this Court enter a decree denying the petition for review and enforcing the Board's order in full.

Marcel Mallet-Prevost, Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., Oct. 26, 1964.

[fol. 10] [File endorsement omitted]

[fol. 11] NOTICE OF MOTION (omitted in printing).

[fol. 13]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 29243

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR LEAVE TO INTERVENE—
Dated November 17, 1964

To The Honorable Judges of the United States Court of Appeals for the Second Circuit:

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, UAW, AFL-CIO (referred to as the Union), moves for leave to intervene as a party in the present proceedings. In support thereof, the Union shows that:

1. The Union filed unfair labor practice charges alleging violations of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U. S. C. §158(1) and (5), upon which the National Labor Relations Board issued an unfair labor practice complaint against petitioner. Throughout the proceedings before the National Labor Relations Board (hereinafter referred to as the Board), the Union fully participated and actively supported the charges it had filed. On September 26, 1963, the Trial Examiner issued his findings and decision recommending that the complaint [fol. 14] be dismissed. The Union filed exceptions to the Trial Examiner's findings and filed a brief supporting its exceptions. On May 13, 1964, the Board issued an order adjudging petitioner guilty of unfair

labor practices as defined in Sections 8(a)(1) and (5) of the Act, *The Fafnir Bearing Company*, 146 N.L.R.B. 179. The Board's order requires the Company to cease and desist from: "Refusing to bargain collectively with [the Union], by refusing to permit the Union to perform independent time studies, through its own experts, on jobs involved in grievances arising under the parties' collective bargaining agreement," and affirmatively orders the petitioner "upon request, permit the Union to perform its own time studies on the jobs involved." Petitioner seeks to have this order reviewed and set aside by this Court.

2. The Board's order thus is the culmination on the administrative level of a proceeding initiated and pressed to a successful resolution by the Union. The Union continues to represent the employees at the petitioner's plant and states the following grounds which require intervention:

The Union is bound in fact by the result here.

(a) The Union is bound by the decision of this Court. A judgment invalidating the Board's order, from which the Union derives substantial benefit, would be final and conclusive and the Union would have no way to redress the injury it suffered because of the judgment rendered in its absence.

[fol. 15] *The Union's interest can be represented adequately only by the Union.*

(b) The labor relations agreement between the Employer and the Union provides for time study of certain jobs. During the years of continued relations between the parties, the Union on numerous occasions requested time study data and the right to have the jobs studied by their own experts. This right was and is needed for the proper administration of the contract. Without such right, the

Union is unable to properly represent its membership or administer the contract. Accordingly, although the Union has the greatest respect for the National Labor Relations Board, it is the *Union's* contract, the *Union's* bargaining status, and the *Union's* members that are jeopardized by the employer's refusal to bargain in good faith. Clearly the contentions of the Union should be advanced in its own behalf.

A compelling reason for the granting of intervention here is that the Board, for a variety of reasons, frequently declines to seek *certiorari* review of adverse Courts of Appeals decisions. In the event of such an adverse decision here, the Union would be denied further review unless it had standing as a party. Similarly, if the Board were to prevail here, it might not oppose petitioner's request for Supreme Court review. If the Union is permitted intervention, however, it would have standing to petition for or to oppose certiorari. [fol. 16] Moreover, there is always the possibility of a doctrinal shift within the Board or the possibility that the Board may see fit to settle or compromise the case.

The case is of national significance.

(c) The matter in issue is of tremendous importance to the Union involved in this proceeding before this Court, as well as to thousands of other unions in the United States having labor relations agreements and facing the problem of time studies of jobs in connection with their administration of labor relations agreements. The ultimate decision in this case might well affect millions of workers and the Union should be permitted to fully participate in the litigation of this matter to its ultimate conclusion.

Intervention might avoid subsequent litigation.

(d) In the event of an adverse ruling and remand to the Board by this Court, the Union, most probably, would be "aggrieved" by the Board's decision upon such remand within the meaning of Section 10(f) of the Act, 29 U.S.C. §160(f). As a consequence the Union would have standing then to seek review *de novo*. Similarly, if petitioner and the Board attempted to settle without the Union having been heard on that issue, or without the Union's consent, an action would lie. In the interest of avoiding a multiplicity of proceedings, the Union should be permitted to intervene at this time.

[fol. 17] *The motion should be granted because there is no prejudice.*

(e) Intervention should be granted because there is a common question of law and fact and there is no probability of delay or prejudice to the parties as a result of the Union's intervention. Intervention, thus, will not delay adjudication or complicate the proceedings.

3. The Union will, if intervention is permitted, support the Board's decision and its petition for enforcement.

Wherefore, the Union respectfully prays that the motion to intervene be granted.

Respectfully submitted,

Joseph L. Rauh, Jr., General Counsel, International Union, UAW, 1625 K St., N.W., Washington 6, D. C.

Stephen I. Schlossberg, Associate General Counsel, International Union, UAW, 8000 E. Jefferson Ave., Detroit 14, Michigan.

John Silard, 1625 K St., N.W., Washington 6, D. C.

William S. Zeman, One Grand St., Hartford 6, Conn.

Benjamin Rubenstein, 393 Seventh Avenue, New York 1, N. Y.

Attorneys for Union.

[fol. 18] Dated: November 17, 1964

To:

Robinson, Robinson & Cole, 750 Main Street, Hartford, Connecticut, Att: Lucian E. Baldwin, Esq., Attorney for Petitioner.

Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington 25, D. C.

[fol. 20]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29,243

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO MOTION FOR LEAVE TO INTERVENE—November 20, 1964

The National Labor Relations Board opposes the Motion to Intervene filed on November 17, 1964, in the above-entitled proceeding by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 133, UAW, AFL-CIO. In support of its opposition, the Board shows as follows:

1. The movant filed with the Board the unfair labor practice charges upon which the complaint against peti-

tioner issued in the instant case. The movant's "interest" in the enforcement of the Board's order, within the meaning of Rule 13(f) of the rules of this Court, is that it will benefit by enforcement of the Board's order against petitioner.

2. As a matter of policy, the Board has consistently opposed intervention by charging parties in support of Board orders because enforcement proceedings are public proceedings for the vindication of public rights. The Board has filed a cross-petition for enforcement of its unfair labor practice order; the petition will be prosecuted diligently, and in a manner that will best serve the public interest. Under the circumstances, no purpose will be served by permitting movant, a private party, to intervene in this litigation, for in this type of proceeding "private parties have no rightful place except as the Court may decide to avail itself of helpful suggestions."

[fol. 21] *Aluminum Ore Co.* v. *N.L.R.B.*, 131 F. 2d 485, 488 (C. A. 7). Accord: *Amalgamated Meat Cutters* v. *N.L.R.B.*, 267 F. 2d 169, 170 (C. A. 1), certiorari denied, 361 U.S. 863; *Semi Steel Casting Co.* v. *N.L.R.B.*, 160 F. 2d 388, 393 (C. A. 8); *Haleston Drug Stores, Inc.* v. *N.L.R.B.*, 190 F. 2d 1022 (C. A. 9); *Henry I. Siegel, Inc.* v. *N.L.R.B.*, No. 29058 (C. A. 2) (unreported).

3. Since movant does not claim to be aggrieved by the Board's order, but seeks only to represent its interest in procuring affirmance by this Court of the order of the Board, it is plain that this interest of movant and the broader interest of the Court may best be served by permitting movant to file a brief *amicus curiae.*

Wherefore, the Board requests that the Court deny the Motion to Intervene, with leave to movant to file a brief as *amicus curiae.*

Marcel Mallet-Prevost, Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this 20th day of November, 1964.

[fol. 22] Certificate of Service (omitted in printing).

[fol. 24]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29,243

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

OPPOSITION OF THE FAFNIR BEARING COMPANY TO PETITION FOR LEAVE TO INTERVENE—November 24, 1964

The Fafnir Bearing Company opposes the Petition for Leave to Intervene filed on November 17, 1964 by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133 UAW, AFL-CIO on the ground that the Union has no standing as a party to this review proceeding in that it is not a "person aggrieved" under Section 10(f) of the National Labor Relations Act, 61 Stat. 148 (1947) 29 U.S.C.A. Section 160(f). *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* v. *National Labor Relations Board,* 267 Fed. 2d 169, 170 (CA 1).

Wherefore, the Company requests that the Court deny the Petition for Leave to Intervene.

Robinson, Robinson & Cole, By Lucian E. Baldwin,
Counsel to The Fafnir Bearing Company.

Dated at Hartford, Connecticut this 24th day of November, 1964.

[fol. 25] Certificate of Service (omitted in printing).

[fol. 27]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1964.

Motion Argued November 30, 1964

Docket No. 29243

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

Before: Friendly and Smith, Circuit Judges, and Blumenfeld, District Judge.*

Motion by union, which had filed charge leading to a determination of unfair labor practices on the part of an employer, for leave to intervene in employer's proceeding for review of the Board's order, in which the Board cross-petitioned for enforcement. Motion denied, with leave to file brief as *amicus curiae*.

OPINION—Decided December 24, 1964

FRIENDLY, *Circuit Judge*:

This is a proceeding by The Fafnir Bearing Company to review an order of the National Labor Relations Board, [fol. 28] 146 N. L. R. B. No. 179 (1964), finding that Fafnir had violated §§8(a)(1) and (5) of the National Labor Relations Act by refusing to permit the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, to perform independent time studies on jobs involved in grievances under the parties' collective bargaining agreement; the Board has cross-petitioned for enforcement. The union, which had filed the

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* Sitting by designation.

pertinent charge, seeks leave to intervene. The company and the Board oppose it, the Board suggesting that we grant the union leave to file a brief as *amicus curiae*. We deny the motion and grant such leave.

Although courts of appeals have permitted a charging person to intervene in a proceeding brought by the Labor Board for enforcement of an order stemming from the charge or a proceeding brought by the condemned party to review such an order, §§10(e) and (f), see, e.g., *West Texas Utils. Co.* v. *NLRB*, 184 F. 2d 233 (D. C. Cir. 1950), *cert. denied*, 341 U. S. 939 (1951); *Kearney & Trecker Corp.* v. *NLRB*, 210 F. 2d 852 (7 Cir. 1954), *cert. denied*, 348 U. S. 824 (1954), all opinions of such courts discussing the issue that have been cited to us have ruled against intervention. See *Aluminum Ore Co.* v. *NLRB*, 131 F. 2d 485, 488 (7 Cir. 1942); *Stewart Die Casting Corp.* v. *NLRB*, 132 F. 2d 801 (7 Cir. 1942); *Haleston Drug Stores, Inc.* v. *NLRB*, 190 F. 2d 1022 (9 Cir. 1950), *cert. denied*, 342 U. S. 815 (1951); *NLRB* v. *Retail Clerks Int'l Ass'n*, 243 F. 2d 777, 783 (9 Cir. 1956); *Amalgamated Meat Cutters* v. *NLRB*, 267 F. 2d 169 (1 Cir.), *cert. denied sub nom. Geilich Tanning Co.* v. *Amalgamated Meat Cutters*, 361 U. S. 863 (1959). Since the issue has not been decided in this circuit, and the union contends that the decisions elsewhere contravene Supreme Court authority, we have thought it desirable to make an independent appraisal. After doing so, we join with other cir-
[fol. 29] cuits in denying intervention, although the issue seems more debatable to us than it did to them.

Section 10(b) of the National Labor Relations Act defines the procedure for an unfair labor practice case. There must first be a charge of an unfair labor practice committed within the preceding six months; the Board or its agent may, but is not required to, issue a complaint. Only the person complained of is expressly given the right to a hearing. But "in the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony." As we read the Board's Rules and

Regulations, §102.8, 29 C. F. R. §102.8 (1964), the charging person is recognized as a party to the administrative proceeding without the need for seeking intervention.

On the other hand the Act makes no provision as to intervention in proceedings for review or enforcement of Board orders—a silence which contrasts with the provisions as to intervention included in the statutes relating to judicial review of orders of the Interstate Commerce Commission, 28 U. S. C. §2323, and in the Hobbs Act, 5 U. S. C. §1038, but which is paralleled by a similar silence as to the review of orders of other administrative agencies, see, e.g., 15 U. S. C. §717r (Natural Gas Act), 16 U. S. C. §8251 (Federal Power Act), 49 U. S. C. §1486 (Federal Aviation Act), compare 49 U. S. C. §1489. Rule 13 of this Court, our version of the uniform rule as to practice and procedure on review of agency action promulgated by the Judicial Conference as directed in the Hobbs Act, 5 U. S. C. §1041, provides in paragraph (f) for a motion by "A person desiring to intervene in a case where the applicable statute does not provide for intervention" without saying what the standards governing intervention are. The fact that the union was accorded the status of an intervener before the Board does not automatically entitle it to the same role in a pro-[fol. 30] ceeding for judicial review. *Amalgamated Meat Cutters* v. *NLRB, supra,* 267 F. 2d at 170.

If we look to F. R. Civ. P. 24 by way of analogy, we ought consider subdivision (a)(2) granting intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," and subdivision (b)(2) for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Although on a superficial view both provisions might seem applicable, analysis shows neither to be. Normally a charging person has no "claim" of any sort apart from that which the Board elects to bring on his behalf; certainly that is true of the union

here.[1] However deeply he may be concerned with the outcome of the Board's proceeding, *Amalgamated Util. Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 (1940), holds that he does not have any legal "interest" since the purpose of the Labor Act is simply to enforce public rights—the Court analogizing the Act to the Federal Trade Commission Act and the rule of a charging party under the former to that of an informant under the latter.

The union's first counter to this—that if the Board had rejected the complaint in whole or even in part, the union could have petitioned for review under §10(f) as "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," *American* [fol. 31] *Newspaper Publishers Ass'n* v. *NLRB*, 345 U. S. 100 (1953), is unpersuasive. As we have just pointed out in *Local 282, Int'l Bhd. of Teamsters* v. *NLRB*, —— F. 2d —— (2 Cir. 1964), the charging person is given standing to do this *ex necessitate* to prevent this portion of the statute from being rendered nugatory, and he is vindicating not a private but the public right. But the union then brings before us the ruling in *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 338-39 (1945), that unions, permitted to intervene in the court of appeals to support a petition by the Board to vacate a decree for back-pay so as to substitute another method, had standing to seek Supreme Court review of an order denying the Board's petition from which the Board had not sought certiorari. See also *Donnelly Garment Co.* v. *NLRB*, 330 U. S. 219 (1947). The Court supported its somewhat cryptic

[1] A different case might—or might not—be presented when the charging person has a contractual claim which he submits initially to the Board because it may also involve an unfair labor practice. Cf. *Smith* v. *Evening News Ass'n*, 371 U. S. 195, 197-98 (1962). Our opinion is not addressed to such a case. And the right of a respondent who has been wholly or partially successful before the Board, to intervene on a petition by the charging party to reverse or modify the Board's order, presents a problem wholly different from that here considered. Such intervention seems to have been regularly allowed, and there would appear to be no doubt as to its propriety.

statement that "in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings, had standing to seek review of the order denying the Board's petition," with two citations. One, *Williams* v. *Morgan*, 111 U. S. 684 (1884), held that bondholders and a committee representing purchasers at a foreclosure sale had standing to seek review of an order as to a mortgage trustee's compensation. The other was the first round of *Amalgamated Util. Workers, supra, Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 218 (1938), which recited the intervention of the alleged company unions as parties aggrieved by the order and of the charging union, seeking to organize the workers, in support of the order, without indicating whether these applications had been opposed.[2]

[fol. 32] The Ninth Circuit, dealing with a problem somewhat different from that here presented, distinguished *Eagle-Picher* on the basis that the union there held to have standing to seek certiorari had already been allowed to intervene in the court of appeals. See *NLRB* v. *Retail Clerks Int'l Ass'n, supra*, 243 F. 2d at 783. It can be argued to the contrary that the Supreme Court would hardly have considered itself bound by an erroneous grant of intervention by a court of appeals. However, nothing indicates that anyone had resisted intervention in the court of appeals, in *Eagle-Picher Mining & Smelting Co.* v. *NLRB*, 141 F. 2d 843 (8 Cir. 1944), and the propriety of such intervention was not even considered in the briefs submitted to the Supreme Court, where the NLRB argued the merits precisely as if it had taken the appeal itself. In this context, we cannot regard the Supreme Court's comment as resolving by implication the problem of contested intervention by a charging party in the courts of appeals.

The union suggests that intervention should be allowed in order to permit it to seek Supreme Court review of an

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[2] Examination of the records indicates that the company union had petitioned for review and that its petition was consolidated with the company's; and that the motion of the charging union to intervene was unopposed and was granted by a single judge.

adverse decision against the Board's opposition or to block a settlement to which the Board and the respondent might agree. If in fact intervention would permit this—a point which we do not decide—these considerations would weigh against the grant rather than for it. We have just held in *Local 282* that the Board may settle over the wishes of the charging party prior to a hearing; no reason appears why the General Counsel could not abandon a case altogether at that stage if this seemed wise. The reasoning that sustains this power applies with almost the same force to the Board after it has passed on the merits of a complaint. While the energy already spent and the disharmony promoted are beyond recall, the public interest as viewed by the Board may yet dictate that the conflict proceed no further; and [fol. 33] *Amalgamated Util. Workers,* which was itself concerned with post-decision rights of the charging party, makes the public interest controlling.

It is true that settlement or abandonment after a Board decision on the merits may leave a precedent on the books which is insulated from review. But the holding is discounted for that very reason, and the problem will likely arise again in some other case where a different balance of factors does not suggest compromise. There is no real analogy with the charging party's conceded right of review after an unfavorable Board decision, where, for example, an erroneous belief of lack of power by the Board might otherwise be perpetuated in case after case. The union also notes that, absent intervention, a charging party's ability to compel an application for certiorari from an adverse decision by us may turn on whether the Board's original decision upheld the party respondent or the charging party. We fear that such minor anomalies cannot be wholly ironed out of the legislative scheme,[3] and we here face no extraor-

[3] Asymmetry would also result if we allowed intervention to facilitate a charging party's applying for certiorari; any advantage would then turn on whether review or enforcement proceedings happened to be initiated, creating the opportunity to intervene, before the Board called a halt.

dinary abuse of administrative discretion testing the limits of judicial power to respond. Cf. *Hourihan* v. *NLRB*, 201 F. 2d 187, 188 & n.4 (D. C. Cir. 1952), *cert. denied*, 345 U. S. 930 (1953). The controlling principle must be that the Board's exclusive powers, granted by Congress in the public interest and more than once recognized by the Supreme Court, should not be impaired by a general practice of granting intervention to charging parties in the courts of appeals.

Motion to intervene denied, with leave to file brief as *amicus curiae*.

[fol. 34]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges, Hon. M. Joseph Blumenfeld, District Judge.

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

ORDER DENYING MOTION FOR LEAVE TO INTERVENE—
December 24, 1964

A motion having been made herein by counsel for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, for leave to intervene,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied with leave to the union to file a brief amicus curiae.

A. Daniel Fusaro, Clerk.

[fol. 35] [File endorsement omitted]

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

No. 883—October Term, 1964

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, Petitioner,

v.

THE FAFNIR BEARING COMPANY, et al.

ORDER ALLOWING CERTIORARI—March 29, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar. The case is set for oral argument immediately following No. 650.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, *Petitioner,*

v.

THE FAFNIR BEARING COMPANY AND THE NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, UAW Local 133, prays that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Second Circuit denying petitioner leave to intervene in proceedings to review an order of the National Labor Relations Board.

Opinions Below

The Decision and Order of the National Labor Relations Board is reported at 146 NLRB No. 179. The opinion of the court below denying leave to petitioner to intervene, issued December 24, 1964, is not yet reported and appears *infra* in Appendix A, pp. 11 to 16.

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit denying the Union leave to intervene was entered on December 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

Question Presented

When the National Labor Relations Board upholds a union's unfair labor practice charge against an employer after proceedings in which the union participates as a party, may the union be denied intervention in judicial review proceedings brought by the employer wherein the union's statutory rights will be finally determined?

Statute Involved

29 U.S.C. § 160(f) provides in part:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides

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[1] Though we believe that statutory certiorari jurisdiction presently lies consistent with the "party to the case" proviso of 28 USC 1254(1), should the Court disagree, we respectfully request leave to have this petition filed as one under 28 USC 1651 for common-law certiorari.

or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . . The court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board".

Statement

On January 18, 1965, this Court granted certiorari in No. 650, *International Union* v. *Scofield*, to review the question whether a union which is the successful *defending party* before the Labor Board may be denied intervention in the judicial review proceeding brought by the charging party. Certiorari is sought in this case on the correlative question whether the union which is the successful *charging party* before the Board may be denied intervention in the judicial review proceeding brought by the defending party. The Court of Appeals below, although noting the existence of precedents both ways, announced that it joins with circuits denying intervention, "although the issue seems more debatable to us than it did to them" (p. 12, *infra*).

On February 11, 1963, petitioner (hereafter referred to as the Union) filed a charge with the National Labor Relations Board alleging that the Fafnir Bearing Company had violated Sections 8(a)(1) and 8(a)(5) of the Act when it refused to permit the Union to perform time studies on jobs involved in certain grievances arising under the collective bargaining agreement between the Union and the Company. Under Section 10(b) of the Act, the Union's

charge was the necessary jurisdictional predicate for the issuance of a complaint by the General Counsel of the NLRB, and such a complaint was in due course issued on May 7, 1963.

Pursuant to Section 102.8 of the Board's Rules and Regulations, the charging Union was a party to the subsequent Board proceedings, and participated throughout on a parity with the Company and the Board's General Counsel. On May 13, 1964 the Board issued its Decision and Order, finding that the Company violated the Union's rights protected by Sections 8(a)(1) and 8(a)(5) of the Act.

On October 9, 1964 the Company filed a petition to review the Decision and Order of the Board in the Court of Appeals for the Second Circuit. On November 30, 1964 the Union moved for leave to intervene in the judicial review proceeding. The Board, consistent with its general position, opposed the Union's intervention and an opinion of the court below denying said intervention was issued on December 24, 1964. See *infra*, Appendix A, p. 11. Certiorari is sought to resolve an important federal question closely related to the issue pending before this Court in *International Union* v. *Scofield*, No. 650.

REASON FOR GRANTING THE WRIT

This Case Presents a Recurrent and Important Intervention Issue Closely Related to the Issue Pending in No. 650, International Union v. Scofield.

1. *Related Issue Pending.* In No. 650, certiorari granted January 18, 1965, this Court is reviewing the question whether a *charged party* before the Labor Board may be denied intervention in the judicial review of the Board's decision; the question in the present case is whether the *charging party* before the Board may be denied intervention in the judicial review of the Board's decision. The

two cases cover equally important halves of the same intervention issue. This Court has frequently deemed appropriate its concurrent review of closely related questions, and has even on occasion effectuated that result on its own motion. See e.g., *Brown* v. *Board of Education*, 344 U.S. 1, 3; *Local Union No. 189* v. *Jewel Tea Co.*, 379 U.S. 813.

2. *Important Question Presented.* Without illuminating opinions or court rules, most circuit courts have denied intervention to the charging party in judicial review of a Board decision, but intervention has occasionally been allowed. See, e.g., *West Texas Utilities Company* v. *NLRB*, 184 F. 2d 233 (C.A.D.C. 1950); *Kearney & Trecker Corporation* v. *NLRB*, 210 F. 2d 852 (C.A. 7 1954); *Inland Steel Company* v. *NLRB*, 170 F. 2d 247 (C.A. 7 1948); *Donnelly Garment Company* v. *NLRB*, 151 F. 2d 854 (C.A. 8 1945); *Local 761, IUE* v. *NLRB*, 278 F. 2d 282 (C.A.D.C. 1960). The opinion below, the first analysis of this recurring subject in the federal appellate courts, follows decisions in other circuits denying intervention to the charging party, while stating that *"the issue seems more debatable to us than it did to them."* Certainly the question here is of no less importance to the orderly administration of justice in federal courts than is the question this Court has agreed to review in No. 650; indeed, applications by charging parties before the Board for Court of Appeals participation are even more frequent than those by respondents.

3. *Intervention Controlled by Fortuity.* Furthermore, like the ruling of the Seventh Circuit in No. 650, the ruling here permits sheer fortuity to control intervention in judicial review of Labor Board cases. Thus, if the Board *dismisses a complaint or any part of a complaint* against an employer, the charging union as a "person aggrieved" under Section 10(f) of the statute may bring judicial review proceedings in the Court of Appeals and participate fully therein, then on certiorari, and finally

before this Court. But if the Board grants the relief sought, the decision below relegates a charging union to the permissive rights of amicus—precluded from equal participation in the Court of Appeals and opportunity to seek certiorari from an adverse judgment.[2] Yet the interest of the charging party in the ultimate determination of its rights under the National Labor Relations Act is identical whether the judicial review be from a Board order granting or from one denying relief. To permit full judicial participation in one case but deny it in the other, is to make sheer fortuity the measure of intervention rights in judicial review of Labor Board orders.

4. *Congressional Intent Frustrated.* It also seems clear that *Congress intended parity of participation by the charging party from the beginning to the end of Labor Board litigation:*

> (i). In Section 10(b) Congress has made the charge by an injured party the jurisdictional prerequisite to the filing of the initial Labor Board complaint;
>
> (ii). Under the Board's construction of the Act, it has given the charging party automatic standing in Board proceedings on parity with the charged party in every respect. Rules and Regulations Sec. 102.8. See

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[2] The present case highlights the importance of this opportunity to seek certiorari. On the merits this case involves the question of the Union's access to time study information, which question the Company claims to have been definitively determined against the position of the Board and the Union by a ruling of the court below some years ago in *NLRB* v. *Otis Elevator Company*, 208 F. 2d 176. Should the court below agree with this view of its own precedent in *Otis Elevator* and apply *stare decisis, only* in this Court could the Union be accorded substantive review. Yet the Board might decline to seek this Court's review, with the net result that the Union which has from the very first participated in the adjudication of its federal right to time study information would be denied the opportunity of obtaining redress before the highest court of the land. Such an eleventh hour curtailment of the injured party's participation in the adjudication of its statutory rights is at odds with the congressional recognition of the essentially tripartite nature of Labor Board adjudication.

also *Marine Engineers' Ben. Ass'n* v. *NLRB*, 202 F. 2d 546 (C.A. 3, 1953), cert. denied, 346 U.S. 819;

(iii). The charging party is deemed a "person aggrieved" within the Congressional intent of Section 10(f), and thus entitled to invoke judicial review if the Board refuses any of the relief sought by the charging party. *Albrecht* v. *NLRB*, 181 F. 2d 652 (C.A. 7, 1950) and cases there cited;

(iv). In the Taft-Hartley Act, in adding the new injunction proviso of Section 10(l), Congress expressly provided that the Board's petition for relief in the District Court should be served "upon any person involved in the charge and such person, *including the charging party*, shall be given an opportunity to appear by counsel and present any relevant testimony" (emphasis supplied).

(v). It would hardly appear likely that Congress, which made the charging party's action necessary to commence the proceedings, fully protected the charging party's right to participate throughout the proceedings, and authorized it to initiate judicial review, intended to deny the significant intervention right here involved.

5. *The "Public Rights" Dogma.* In denying intervention the court below relies principally upon *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, which emphasized the "public rights" approach of the NLRA and rejected labor union standing to bring a judicial contempt proceeding upon an injunction originally obtained by the Board. But *Amalgamated Utility Workers* is clearly not controlling on the present issue. The present question is not whether the aggrieved charging party before the Board may bring a contempt proceeding, but whether he may intervene in existing judicial review and enforcement

proceedings brought by the Company and the Board. Cf. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 506-8.

Moreover, *Amalgamated* notwithstanding, this Court has recognized the existence of "private rights" under the NLRA, and the consequent standing of injured private parties to initiate and to participate in judicial review of Board action. See, e.g., *Leedom* v. *Kyne*, 358 U.S. 184, 190; *Office Employees* v. *NLRB*, 353 U.S. 313; *International Union* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 338; *cf. Hirsch* v. *McCulloch*, 303 F. 2d 208 (C.A.D.C. 1962). A sharp division between "public rights" and "private rights" in labor relations has been rejected in recent decisions of this Court recognizing the direct interplay between unfair labor practice remedies and judicial or arbitral remedies under the collective bargaining agreement. See, e.g., *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268; *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 197. Indeed, in Section 301 and other Taft-Hartley amendments there is implicit the recognition that rights under Section 7 of the Act and those arising under collective bargaining agreements directly bear each on the other. See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-457; *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 102-105. In the present case, to deny the Union parity of judicial participation in the determination whether the employer is bargaining with it in good faith on contract grievances, is in effect to determine *in absentia* both its "public" rights under federal law and its "private" rights under the collective contract. Certainly, such a result raises serious due process questions.[3]

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[3] In the present case there is the most direct relationship between the unfair labor practice issue under review in the court below and the Union's contractual rights. As the court below stated, the issue under review involves the union's opportunity *"to perform independent time studies*

6. *Orderly Administration of Justice.* A final important predicate for this Court's review inheres in the need for orderly administration of justice in the federal courts. See *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 260. All apart from the Union's claim of a right to intervention, it is clear that the Court of Appeals has the *power* to permit intervention to effectuate orderly adjudication. See *United States* v. *Lousiana*, 354 U.S. 515; *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 524-25, cert. denied 335 U.S. 912. When a Court of Appeals which denies intervention to the charging party reverses the Board's grant of relief, the subsequent Board order, which dismisses part or all of the complaint pursuant to the court's mandate, then seems clearly subject to appeal under Section 10(f) of the Act by the charging party as an "aggrieved person". Of course, if the charging party intervenes in the first judicial review proceeding, *res adjudicata* applies on its petition to review the Board's subsequent order pursuant to the mandate of the Court of Appeals. See *Siegel Co.* v. *NLRB*, —— F. 2d ——, 58 LRRM 2182; earlier decision, 324 F. 2d 228. But if denied intervention in the first judicial review proceeding, the charging party is entitled to *de novo* review on the merits whether it appeals to the original circuit court or to some different circuit. Such redundant and disorderly appellate review can be obviated by granting the charging party intervention in the original judicial review—a policy which can be effectuated by this Court's exercise of its supervisory authority to promote orderly administration of justice in the federal courts.

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on jobs involved in grievances under the parties' collective bargaining agreement . . ." To deny the Union participation as a party in the ultimate judicial determination of that question, is to effect the quantum of its substantive and procedural rights under the contract with the Company without its day in court. *Cf.*, n. 1, *infra*, p. 13.

Conclusion

It is respectfully submitted that the writ should be granted to resolve the other half of the question pending in No. 650.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

September Term, 1964

(Motion Argued November 30, 1964

Decided December 24, 1964)

Docket No. 29243

THE FAFNIR BEARING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Before: FRIENDLY and SMITH, *Circuit Judges,* and BLUMENFELD, *District Judge.**

Motion by union, which had filed charge leading to a determination of unfair labor practices on the part of an employer, for leave to intervene in employer's proceeding for review of the Board's order, in which the Board cross-petitioned for enforcement. Motion denied, with leave to file brief as *amicus curiae.*

FRIENDLY, *Circuit Judge:*

This is a proceeding by The Fafnir Bearing Company to review an order of the National Labor Relations Board, 146 N.L.R.B. No. 179 (1964), finding that Fafnir had violated §§ 8(a)(1) and (5) of the National Labor Relations Act by refusing to permit the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, to perform independent time studies on jobs involved in grievances under the parties' collective bargaining agreement; the Board has cross-petitioned for enforcement. The union, which had filed the pertinent charge, seeks leave to intervene. The

* Sitting by designation.

company and the Board oppose it, the Board suggesting that we grant the union leave to file a brief as *amicus curiae*. We deny the motion and grant such leave.

Although courts of appeals have permitted a charging person to intervene in a proceeding brought by the Labor Board for enforcement of an order stemming from the charge or a proceeding brought by the condemned party to review such an order, §§ 10(e) and (f), see, e.g., *West Texas Utils. Co.* v. *NLRB*, 184 F. 2d 233 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 939 (1951); *Kearney & Trecker Corp.* v. *NLRB*, 210 F. 2d 852 (7 Cir. 1954), *cert. denied*, 348 U.S. 824 (1954), all opinions of such courts discussing the issue that have been cited to us have ruled against intervention. See *Aluminum Ore Co.* v. *NLRB*, 131 F. 2d 485, 488 (7 Cir. 1942); *Stewart Die Casting Corp.* v. *NLRB*, 132 F. 2d 801 (7 Cir. 1942); *Haleston Drug Stores, Inc.* v. *NLRB*, 190 F. 2d 1022 (9 Cir. 1950), *cert. denied*, 342 U.S. 815 (1951); *NLRB* v. *Retail Clerks Int'l Ass'n*, 243 F. 2d 777, 783 (9 Cir. 1956); *Amalgamated Meat Cutters* v. *NLRB*, 267 F. 2d 169 (1 Cir.), *cert. denied sub nom. Geilich Tanning Co.* v. *Amalgamated Meat Cutters*, 361 U.S. 863 (1959). Since the issue has not been decided in this circuit, and the union contends that the decisions elsewhere contravene Supreme Court authority, we have thought it desirable to make an independent appraisal. After doing so, we join with other circuits in denying intervention, although the issue seems more debatable to us than it did to them.

Section 10(b) of the National Labor Relations Act defines the procedure for an unfair labor practice case. There must first be a charge of an unfair labor practice committed within the preceding six months; the Board or its agent may, but is not required to, issue a complaint. Only the person complained of is expressly given the right to a hearing. But "in the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony." As we read the Board's Rules and Regulations, § 102.8, 29 C.F.R. § 102.8 (1964), the charging person is recognized as a party to the administrative proceeding without the need for seeking intervention.

On the other hand the Act makes no provision as to intervention in proceedings for review or enforcement of

Board orders—a silence which contrasts with the provisions as to intervention included in the statutes relating to judicial review of orders of the Interstate Commerce Commission, 28 U.S.C. § 2323, and in the Hobbs Act, 5 U.S.C. § 1038, but which is paralleled by a similar silence as to the review of orders of other administrative agencies, see, e.g., 15 U.S.C. § 717r (Natural Gas Act), 16 U.S.C. § 8251 (Federal Power Act), 49 U.S.C. § 1486 (Federal Aviation Act), compare 49 U.S.C. § 1489. Rule 13 of this Court, our version of the uniform rule as to practice and procedure on review of agency action promulgated by the Judicial Conference as directed in the Hobbs Act, 5 U.S.C. § 1041, provides in paragraph (f) for a motion by "A person desiring to intervene in a case where the applicable statute does not provide for intervention" without saying what the standards governing intervention are. The fact that the union was accorded the status of an intervener before the Board does not automatically entitle it to the same role in a proceeding for judicial review. *Amalgamated Meat Cutters* v. *NLRB, supra,* 267 F. 2d at 170.

If we look to F. R. Civ. P. 24 by way of analogy, we ought consider subdivision (a)(2) granting intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," and subdivision (b)(2) for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Although on a superficial view both provisions might seem applicable, analysis shows neither to be. Normally a charging person has no "claim" of any sort apart from that which the Board elects to bring on his behalf; certainly that is true of the union here.[1] However deeply he may

[1] A different case might—or might not—be presented when the charging person has a contractual claim which he submits initially to the Board because it may also involve an unfair labor practice. Cf. *Smith* v. *Evening News Ass'n,* 371 U.S. 195, 197-98 (1962). Our opinion is not addressed to such a case. And the right of a respondent who has been wholly or partially successful before the Board, to intervene on a petition by the charging party to reverse or modify the Board's order, presents a problem wholly different from that here considered. Such intervention seems to have been regularly allowed, and there would appear to be no doubt as to its propriety.

be concerned with the outcome of the Board's proceeding, *Amalgamated Util. Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940), holds that he does not have any legal "interest" since the purpose of the Labor Act is simply to enforce public rights—the Court analogizing the Act to the Federal Trade Commission Act and the rule of a charging party under the former to that of an informant under the latter.

The union's first counter to this—that if the Board had rejected the complaint in whole or even in part, the union could have petitioned for review under § 10(f) as "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," *American Newspaper Publishers Ass'n* v. *NLRB*, 345 U.S. 100 (1953), is unpersuasive. As we have just pointed out in *Local 282, Int'l Bhd. of Teamsters* v. *NLRB*, —— F. 2d —— (2 Cir. 1964), the charging person is given standing to do this *ex necessitate* to prevent this portion of the statute from being rendered nugatory, and he is vindicating not a private but the public right. But the union then brings before us the ruling in *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338-39 (1945), that unions, permitted to intervene in the court of appeals to support a petition by the Board to vacate a decree for back-pay so as to substitute another method, had standing to seek Supreme Court review of an order denying the Board's petition from which the Board had not sought certiorari. See also *Donnelly Garment Co.* v. *NLRB*, 330 U.S. 219 (1947). The Court supported its somewhat cryptic statement that "in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings, had standing to seek review of the order denying the Board's petition," with two citations. One, *Williams* v. *Morgan*, 111 U.S. 684 (1884), held that bondholders and a committee representing purchasers at a foreclosure sale had standing to seek review of an order as to a mortgage trustee's compensation. The other was the first round of *Amalgamated Util. Workers, supra, Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 218 (1938), which recited the intervention of the alleged company unions as parties aggrieved by the order and of the charg-

ing union, seeking to organize the workers, in support of the order, without indicating whether these applications had been opposed.[2]

The Ninth Circuit, dealing with a problem somewhat different from that here presented, distinguished *Eagle-Picher* on the basis that the union there held to have standing to seek certiorari had already been allowed to intervene in the court of appeals. See *NLRB* v. *Retail Clerks Int'l Ass'n, supra,* 243 F. 2d at 783. It can be argued to the contrary that the Supreme Court would hardly have considered itself bound by an erroneous grant of intervention by a court of appeals. However, nothing indicates that anyone had resisted intervention in the court of appeals, in *Eagle-Picher Mining & Smelting Co.* v. *NLRB,* 141 F. 2d 843 (8 Cir. 1944), and the propriety of such intervention was not even considered in the briefs submitted to the Supreme Court, where the NLRB argued the merits precisely as if it had taken the appeal itself. In this context, we cannot regard the Supreme Court's comment as resolving by implication the problem of contested intervention by a charging party in the courts of appeals.

The union suggests that intervention should be allowed in order to permit it to seek Supreme Court review of an adverse decision against the Board's opposition or to block a settlement to which the Board and the respondent might agree. If in fact intervention would permit this—a point which we do not decide—these considerations would weigh against the grant rather than for it. We have just held in *Local 282* that the Board may settle over the wishes of the charging party prior to a hearing; no reason appears why the General Counsel could not abandon a case altogether at that stage if this seemed wise. The reasoning that sustains this power applies with almost the same force to the Board after it has passed on the merits of a complaint. While the energy already spent and the disharmony promoted are beyond recall, the public interest as viewed by

[2] Examination of the records indicates that the company union had petitioned for review and that its petition was consolidated with the company's; and that the motion of the charging union to intervene was unopposed and was granted by a single judge.

the Board may yet dictate that the conflict proceed no further; and *Amalgamated Util. Workers,* which was itself concerned with post-decision rights of the charging party, makes the public interest controlling.

It is true that settlement or abandonment after a Board decision on the merits may leave a precedent on the books which is insulated from review. But the holding is discounted for that very reason, and the problem will likely arise again in some other case where a different balance of factors does not suggest compromise. There is no real analogy with the charging party's conceded right of review after an unfavorable Board decision, where, for example, an erroneous belief of lack of power by the Board might otherwise be perpetuated in case after case. The union also notes that, absent intervention, a charging party's ability to compel an application for certiorari from an adverse decision by us may turn on whether the Board's original decision upheld the party respondent or the charging party. We fear that such minor anomalies cannot be wholly ironed out of the legislative scheme,[3] and we here face no extraordinary abuse of administrative discretion testing the limits of judicial power to respond. Cf. *Hourihan* v. *NLRB,* 201 F. 2d 187, 188 & n.4 (D.C. Cir. 1952), *cert. denied,* 345 U.S. 930 (1953). The controlling principle must be that the Board's exclusive powers, granted by Congress in the public interest and more than once recognized by the Supreme Court, should not be impaired by a general practice of granting intervention to charging parties in the courts of appeals.

Motion to intervene denied, with leave to file brief as *amicus curiae.*

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[3] Asymmetry would also result if we allowed intervention to facilitate a charging party's applying for certiorari; any advantage would then turn on whether review or enforcement proceedings happened to be initiated, creating the opportunity to intervene, before the Board called a halt.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 883

INTERNATIONAL UNION, LOCAL 133, UAW-AFL-CIO

v.

THE FAFNIR BEARING COMPANY AND THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

On May 13, 1964, the Board, upon charges filed by petitioner Union, issued its Decision and Order finding that Fafnir Bearing Co. ("Fafnir") had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. The Company filed in the court below a petition to review the Board's order and the Board filed an answer and a cross-petition for enforcement. Petitioner, the successful charging party in the Board

proceeding, filed a motion for leave to intervene as a party in the court proceeding, which the Board and Fafnir opposed. On December 24, 1964, the court below denied the Union's motion to intervene (Pet. 11-16).[1]

The question presented is whether, when the Board sustains charges of unfair labor practices, the party who filed the charges before the Board is entitled to intervene in proceedings in the court of appeals seeking review or enforcement of the Board's order. The Board believes, for the reasons set forth in Judge Friendly's opinion below, that the charging party is not entitled to intervene in these circumstances. However, as petitioner correctly points out (Pet. 4-5), the question here is closely related to that in *International Union, United Automobile Workers* v. *Scofield*, No. 650, certiorari granted, January 18, 1965. There the question is whether, when the Board dismisses an unfair labor practice complaint and the charging party seeks review of the dismissal in the court of appeals, the party against whom the complaint was issued is entitled to intervene in the court proceeding. In deciding the question in *Scofield*, which the Board believes should be answered in the affirmative, it might be helpful for the Court also to have before it the related problem presented by the instant

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[1] The Court adopted the Board's suggestion that petitioner be allowed to file an *amicus* brief.

case. Accordingly, we do not oppose the grant of certiorari here.

Respectfully submitted,

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MARCH 1965

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 53

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, *Petitioner*,

v.

THE FAFNIR BEARING COMPANY, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The decision and order of the National Labor Relations Board is reported at 146 NLRB 1582. The opinion of the United States Court of Appeals for the Second Circuit, denying petitioner's motion to intervene in the review proceedings in that court, is reported at 339 F. 2d 801 and appears at R.16.

Jurisdiction

The order of the Court of Appeals denying leave to intervene was entered on the same day as the rendition of the opinion, December 24, 1964. The petition for a writ of certiorari was filed on February 5, 1965, and was granted on March 29, 1965. 380 U.S. 950; R. 23. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented

When the National Labor Relations Board upholds a union's unfair labor practice charge against an employer and, following proceedings in which the union participated as a party, issues a cease and desist order directed at the employer, does the union have a right to intervene in judicial review proceedings brought by the employer, pursuant to § 10 (f) of the National Labor Relations Act, wherein the union's statutory rights will be finally determined?

Statute Involved

Section 10 (f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160 (f), provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside . . . Upon the filing of such petition, the court shall proceed in the

same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Statement

This case, like its companion No. 18, Oct. Term 1965, *International Union* v. *Scofield,* involves the appellate intervention rights of a party who has prevailed in proceedings before the Labor Board. The only difference is that the party seeking intervention in No. 18 is the one charged with having committed an unfair labor practice, whereas the party seeking intervention in the instant case is the charging party, having charged another with committing an unfair labor practice.

It is against the backdrop of the unfair labor practice proceeding before the Board that the intervention issue before this Court must be viewed. The facts underlying the merits are not in dispute. They were summarized by the Labor Board as follows:

(1) The Company and the Union had been parties to collective bargaining agreements since 1944. The agreement currently in effect contained an incentive wage clause, providing for the establishment of standard production rates that would reflect the number of pieces produced by an employee working with normal incentive. Employees who exceeded the standard rate were entitled to compen-

sation in excess of the regular hourly wage commensurate with the additional production. It was the Company's obligation to fix the standard rates. 146 NLRB at 1582-1583.

(2) The standard production rates were fixed by industrial engineers (called ratesetters) employed by the Company. This process required the ratesetters to utilize both objective observation of the production process (such as measuring machine speed) and subjective judgment (such as judging employee fatigue). 146 NLRB at 1583.

(3) The agreement also provided a grievance procedure, culminating in arbitration, for disputes over the setting of the standard rates. The permanent arbitrator was himself an industrial engineer who had in the past conducted independent time studies of operations involved in grievances. 146 NLRB at 1583.

(4) The instant case involved four disputes respecting the establishment of standard rates. At the final step in the grievance procedure, prior to arbitration, the Union's expert industrial engineer requested and received from the Company the time-study data prepared by the Company's industrial engineers. After studying this data and finding it incomplete and therefore unsatisfactory, the Union's engineer informed the Company that he was unable to advise the Union whether, in his opinion, the rates set for the disputed operations were in conformity with the provisions of the collective bargaining agreement and thus could not advise the Union whether to proceed to arbitration of the grievances. He accordingly asked permission to perform his own time study in order to enable him to advise the Union in these respects. 146 NLRB at 1583-1584.

(5) The Company denied the request on grounds that the additional study was unnecessary, that the contract did not grant the Union the right to make an independent

time study, and that the arbitrator would conduct his own time study. The Company's position was that all four of the grievances were subject to arbitration; the Company then offered to arbitrate them all. 146 NLRB at 1584.

The petitioner Union thereupon filed a charge with the Labor Board, alleging that the refusal to permit the Union time study of the four jobs was in violation of Sections 8 (a) (1) and (5) of the Act.[1] The General Counsel of the Labor Board, acting through a regional director, issued a complaint. A hearing was thereafter held before a trial examiner. All parties, including the petitioner Union,[2] were represented at and participated in the hearing and had full opportunity to introduce evidence, subpoena, examine and cross-examine witnesses, and present written and oral arguments. At this hearing the General Counsel supported the allegations of the complaint that the respondent Company had violated § 8(a) (1) and (5).

On September 26, 1963, the trial examiner issued a decision (see 146 NLRB at 1591-1599) finding that the respondent Company had not violated the Act as alleged in the complaint and recommending that the complaint be dismissed in its entirety. He reasoned that it is lawful for

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[1] Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights under Section 7 (such as the right to self-organization, to form or join labor organizations, and to bargain collectively). Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. Refusal to supply information to make bargaining possible on an informed and intelligent basis is a "refusal to bargain." *Timken Roller Bearing Co.* v. *NLRB*, 325 F. 2d 746 (C.A. 6), cert. den. 376 U.S. 971; *N.L.R.B.* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260 (C.A. 2), cert. den. 375 U.S. 834.

[2] The petitioner Union, as the charging party, was a party to the proceedings pursuant to Sec. 102.8 of the Board's Rules and Regulations. That section defines the term "party", for purposes of Board proceedings, to include "any person filing a charge or petition under the act." 29 C.F.R. § 102.8.

parties to channel and direct their bargaining by consensual arrangements, that the parties had done so here in the bargaining agreement, and that the Union's recourse for "breach of contract" "lies either in arbitration or in litigation before a judicial forum empowered to interpret and enforce the Union's construction of the disputed text." The trial examiner additionally ruled that Section 8(a)(5) "does not impose upon an employer an obligation to acquiesce in a union's demands for an independent time study by such union after such employer has supplied it with all his relevant time studies." 146 NLRB at 1597.

Thereafter the General Counsel and the petitioner Union (as the charging party) filed exceptions to the trial examiner's decision, and briefs in support thereof; the respondent Company (as the charged party) filed a brief in support of the decision, as well as cross-exceptions and a brief in support thereof.

On May 13, 1964, the Labor Board, dividing 3-1,[3] entered a decision and order which declined to follow the trial examiner's recommendations and instead found that the respondent Company had violated § 8(a)(1) and (5) of the Act by refusing to permit the petitioner Union to perform a time study of the disputed operations. 146 NLRB 1582. An order was entered directing the Company to cease and desist from refusing to bargain collectively by refusing to permit the Union to perform the time studies and directing that the Company take certain affirmative action to effectuate the Union's right to conduct such studies. 146 NLRB at 1588.

The Board majority agreed with the trial examiner that the information which the Union sought was both relevant and necessary to enable the Union to make an intelligent decision whether to proceed to arbitration. But unlike the

[3] Member Jenkins took no part in the consideration of the case.

trial examiner, the Board majority ruled that the Company's refusal in the circumstances to allow the Union to make time studies constituted a violation of the Company's duty to bargain in good faith. This conclusion was premised on established precedent that § 8(a) (5) imposes a duty on the employer "to furnish upon request all information relevant to the bargaining representative's intelligent performance of its functions," an obligation that extends to information needed by the union "to police and administer existing agreements." 146 NLRB at 1585.

The Board further concluded that the Company's asserted justifications for refusing to grant the request were unsound. The collective bargaining agreement, while not expressly recognizing the Union's right to make time studies, did not prohibit such studies. And the Union had not waived its "statutory right to such information." 146 NLRB at 1585. The fact that if the matter went to arbitration the arbitrator would perform his own time studies was not a substitute for the Union's right to do so itself. Thus, concluded the Board, the benefit to the Union in making its own study—both to decide whether to arbitrate and to prepare its case for possible arbitration—"are not so tenuous or insubstantial as to warrant our declining to support the Union's statutory claim to the information sought." 146 NLRB at 1586.

The dissent of Member Leedom, 146 NLRB at 1588-1591, was premised upon the belief that the Union should not be allowed access to production areas while employees are working in the absence of proof that denial of access would constitute an unreasonable impediment to the Union's exercise of its statutory rights. He felt that the past history of the parties' relationships and the alternative sources of information available to the Union showed that such access was unnecessary. To this the majority responded that the Company had failed to show that access

to production areas—where time studies of necessity must be conducted—would interfere with production or discipline, and that upon a balancing of interests the Union's statutory right to this information outweighed any of the Company's property rights or other interests. 146 NLRB at 1586-1587.

The Company filed a motion for reconsideration, to which the General Counsel and the petitioner Union filed objections. The Labor Board denied the motion. R. 3.

Thereafter on October 9, 1964, the respondent Fafnir Bearing Company filed in the Court of Appeals for the Second Circuit a petition for review of the Board's decision and order pursuant to § 10(f) of the Act. R. 1-6. The petition named only the Board as respondent. The Fafnir Company contended then, consistent with its earlier positions, that "the parties' contractual grievance procedure" was the exclusive remedy for the resolution of the disputes. R. 4. Among the other assignments of error which the petition designated as the basis for review were (1) the Board's holding that the Union "has an absolute, statutory right of access to the production areas of the Company's plant during working hours, for the purpose of making independent time studies of disputed operations by its own expert to investigate and verify time study data already furnished to the union by the company"; and (2) the Board's holding that the Company "refused to bargain in good faith by denying access to production areas of the company's plant during working hours to a union industrial engineer, for the purpose of making independent time studies . . ." R. 3. The petition concluded by praying that the Board's decision and order be in all respects set aside and the petitioner Union's complaint dismissed. R. 6.

The Board filed its answer (R. 7), asserting that its order was in all respects valid and proper under the Act.

This answer was joined with a cross-petition for enforcement of the Board's order. The petitioner Union then filed a petition for leave to intervene. R. 9. This petition set forth the following as grounds for intervention:

(1) The Union would be bound by the decision of the Court and an adverse decision would deprive it of the substantial benefit gained from the Board's order. R. 10.

(2) The Union's interest in the case could be represented adequately only by the Union itself. It was the Union's contract, the Union's bargaining status and the Union's members that would be jeopardized by the employer's refusal to bargain in good faith; and those interests should be advanced by the Union on its own behalf. It was noted that a compelling reason for intervention was the standing the Union would thereby acquire to seek certiorari from an adverse court decision, particularly if the Board declined to seek certiorari. R. 10-11.

(3) The matter in issue was of tremendous importance not only to this particular Union but to other unions throughout the United States having similar problems. R. 11.

(4) In the event of an adverse court ruling and a remand to the Board for dismissal of the complaint, the Union would have the right to seek a new review under § 10(f) as an aggrieved party. Thus intervention at this stage would avoid a multiplicity of proceedings. R. 12.

(5) Intervention would cause no delay or prejudice to the parties; nor would it complicate the proceedings. R. 12.

Both the Board and the Fafnir Company filed oppositions to the motion for leave to intervene. See R. 13 and R. 15. The Board's opposition stated that as "a matter of policy" the Board has consistently opposed intervention by charging parties in support of Board orders "because enforcement proceedings are public proceedings

for the vindication of public rights." R. 14. Claiming that the petitioner Union was not a party "aggrieved by the Board's order," the Board's opposition argued that no purpose would be served by permitting intervention; "private parties have no rightful place" in this type of proceeding "except as the Court may decide to avail itself of helpful suggestions." R. 14. It was suggested that the Union be given leave to file a brief as *amicus curiae*. R. 14.[4]

The Fafnir Company's opposition simply stated that "the Union has no standing as a party to this review proceeding in that it is not a 'person aggrieved' under Section 10(f) of the National Labor Relations Act". R. 15.

On December 24, 1964, following oral argument on the motion for leave to intervene, the Second Circuit rendered an opinion denying the motion, with leave to the Union to file a brief as *amicus curiae*. R. 16; 339 F. 2d 801. That opinion, written by Circuit Judge Friendly, is now under review by this Court.

Summary of Argument

In the companion case, *International Union* v. *Scofield*, No. 18, Oct. Term 1965, the question is whether the silence of Congress in § 10(f) of the National Labor Relations Act should be interpreted to give a *charged* party the right to intervene in judicial review proceedings brought by the *charging* party. Here the question is whether the *charging* party should be permitted to intervene in judicial review proceedings brought by the *charged* party. While

[4] The Board's policy position opposing intervention by "charging" parties but favoring intervention by "charged" parties is analogous to the discredited "negative order" concept that once applied to judicial review of administrative decisions, i.e., "Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person". *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 130.

these two questions involve differing considerations, the answers in both instances should be the same. It is fundamentally unfair and inequitable that any party to Labor Board proceedings, be he the charged party or the charging party, should be precluded from full participation in judicial review proceedings wherein his direct interests and statutory rights will be authoritatively resolved. And the proper administration of § 10(f) would seem to require such intervention in order to effectuate the demands of fairness, to permit the affected party to take advantage of full appeal rights, and to avoid a multiplicity of litigation.

A

The Labor Act recognizes private rights within a framework of the public interest. Private rights and public rights concepts interblend throughout the statutory proceedings. There is shared responsibility with primary authority vested at various stages first here and then there, first in the private domain and then the public.

This Court's decision in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (the chief authority relied upon below) does not require a formal or rigid distinction between public interest and private rights in each and every instance. There, this Court demonstrated flexibility in this regard. The Court held that private parties who initiate unfair labor practice charges lack standing to seek contempt action by the court which enforces the Labor Board order; but this Court in the same decision acknowledged the right of the same private parties to intervene in the appellate review proceedings when the merits of the Labor Board decision were in issue. 309 U.S. at 263.

The repeated emphasis upon the public interest involved in the Labor Act and the Labor Board's exclusive function

in enforcing that public interest is simply a means of distinguishing and rejecting private efforts to disturb the Board's exclusive functions, to utilize the Board's procedures for adjudicating claims outside the statutory reach, or to prosecute claims in other forums which cut across matters preempted by Congress. The public interest concept is but a shorthand method of referring to those aspects of the Act relating to the exclusivity of the Board's jurisdiction and procedures. *It does not imply the absence of private interests or claims within the public arena.* Nor does it exclude the possibility that, consistent with the Act, certain private rights may be pursued either before the Board or alternatively before some other forum.

Indeed, the whole concern of the Labor Act is to recognize, in the public interest, certain rights and obligations of both labor and management. Those reciprocal rights and obligations are the very content of the Act. Section 7 of the Act, 29 U.S.C. § 157, for example, expressly recognizes the "right" of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities . . . and . . . to refrain from any or all of such activities . . ." And Section 8, 29 U.S.C. § 158, creates a host of obligations and correlative rights as to both employers and unions; the duties and restraints therein imposed by way of prohibiting unfair labor practices create a manifold compendium of private interests subject to statutory adjudication.

B

There are very real private rights at stake in this case. Basically the right involved is that recognized in § 7 of the Act, the right to bargain collectively with an employer. Only with the time-study information requested by the

Union, as the Board found, could the Union "fulfill its function as the bargaining representative."

At least twelve times during the course of the Board's opinion the Union's interest in this matter is referred to as a statutory right of the Union. See 146 NLRB at 1585-1587. The opinion is replete with such references as the Union's "statutory right to such information," its "statutory claim to the information sought," the employer's "denial of rights guaranteed under the Act," and "the denial of the statutory right here involved."

While it may be said that the Union's statutory right became impressed with public policy considerations, enabling the Board to recognize and enforce it, that right or interest remained as an object of parochial Union concern. The Union's interest has both public and private connotations; the latter requires intervention in both the Board and appellate court proceedings.

C

Practical considerations require intervention, upon request, by a party charging violation of the Labor Act. Just as in the companion *Scofield* case, review by the appellate court generates several practical reasons why intervention should be allowed to the charging party as a matter of effective and expeditious administration of § 10(f).

Petitioner Union's interest will be protected in this first appeal to the court below or not at all. Although petitioner might take an appeal from a Board dismissal of the complaint after a remand from an unfavorable decision of the court below, as a practical matter the second proceeding would be controlled by the facts found and the legal conclusions reached in the first proceeding. Without according the Union the right to assert and litigate its interests

in the first proceeding, there can be no assurance that those interests will ever be objectively considered in the light of the Union's contentions or that they will be given the weight in appellate proceedings to which they are entitled.

Intervention by the Union in the court below will bring all the interested parties before the court; it will provide the court with the facts and considerations underlying the need for the time-study information—as only the Union can present this need. Furthermore, intervention at this stage would avoid a multiplicity of proceedings by eliminating the possibility as well as the futility of the Union seeking an additional appeal from a Board order dismissing the complaint in the event the court below should reverse the Board's outstanding decree.

Since the Union's statutory rights are about to be authoritatively adjudicated, the accepted notions of appellate court equity require that it "be given an opportunity to be heard . . ." *Davis* v. *Mercantile Trust Co.*, 152 U.S. 590, 593. This opportunity to be heard means full participation as a party and not simply the right to file a brief *amicus curiae;* it means full participation in the court below and the right to seek certiorari in this Court. Intervention below guarantees that the entire controversy will be centralized and confined in one proceeding, enabling both the court below and this Court to review all relevant issues in the light of the contentions of all the interested parties.

Furthermore, the Union's right to participate in the appellate proceedings should not be precluded by the fortuity of its success before the Board. If the Union's complaint against the respondent Company had been dismissed by the Board, it could have appealed to the court below as an "aggrieved" party. Yet the statutory claims and rights that the Union would be asserting as such an "aggrieved" party are precisely the same as the claims and rights it is

now seeking to assert. Reality, not fortuity, should determine intervention rights.

Finally, intervention in the court below would conform to the general congressional policy favoring intervention. Congress has manifested this policy in allowing intervention in Board proceedings. It has manifested this policy in allowing intervention in judicial review proceedings from other agencies. See 28 U.S.C. 2323; 5 U.S.C. 1038. And this policy of Congress is further enunciated in Rules 19 and 24 of the Federal Rules of Civil Procedure. It appears only reasonable to read this policy of Congress into the judicial review provisions of § 10(f) of the National Labor Relations Act. The silence of § 10(f) with respect to intervention cannot be taken as a rejection of the uniform policy favoring intervention adopted whenever Congress expressly directed its attention to that subject.

Argument

The failure of Congress specifically to mention the right of directly affected parties to intervene in judicial review proceedings under § 10(f) of the National Labor Relations Act has created the two problems now before this Court:

(1) Does the party charged before the Labor Board with having committed an unfair labor practice have a right to intervene in the judicial review under § 10(f) of a Board order dismissing the charge? That is the question to be answered in the case companion to the instant one, *International Union* v. *Scofield,* No. 18, Oct. Term 1965.

(2) Does the charging party before the Board, the party who has charged another with having committed an unfair labor practice, have a right to intervene in the judicial review under § 10(f) of a Board order finding

that such an unfair labor practice has been committed and directing the other party to cease and desist therefrom? That is the question to be answered in this case.

While these two questions involve differing considerations, the answers in both instances should be the same. It is fundamentally unfair and inequitable that any party to Labor Board proceedings, be he the charged party or the charging party, should be precluded from full participation in judicial review proceedings wherein his direct interests and statutory rights will be authoritatively resolved. And the proper administration of § 10(f) would seem to require such intervention in order to effectuate the demands of fairness, to permit the affected party to take advantage of full appeal rights, and to avoid a multiplicity of litigation. In these circumstances, as in the *Scofield* case, the equitable requirements that must be deemed incorporated in § 10(f)[5] require intervention when requested by the party whose interests are directly at stake.

In short, as was said by the Report of the Advisory Panel on Labor-Management Relations Law to the Senate Labor Committee in 1960, authored by a distinguished group under the chairmanship of Professor Archibald Cox,[6] "We also believe that any party to NLRB proceedings should be allowed to intervene in the appellate proceedings. This would clarify an uncertain issue."

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[5] Where a statute, like 10(f), requires a judicial type hearing but is silent about the details of such a hearing, it must be assumed that Congress intended the hearing to be in conformity with the requirements of equity and due process. *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 182; *The Japanese Immigrant Case*, 189 U.S. 86, 101; *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 107-108; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49.

[6] S. Doc. No. 81, 86th Cong., 2d Sess. (1960), p. 17. Members of this Cox Committee include David L. Cole, Guy Farmer, Arthur Goldberg, Charles Gregory, Denison Kitchel, Plato E. Papps, Gerard Reilly, Louis Sherman, Russell A. Smith, George W. Taylor, and W. Willard Wirtz.

These experts of labor-management relations based this recommendation on the following rationale: "Although proceedings before the NLRB are undertaken in the public interest, since 1947 they have also been concerned with the vindication of essentially private rights. The Board is no longer charged solely with promoting the spread of labor unions and collective bargaining. It is largely an umpire engaged in enforcing established rules first against one party and then against the other. Unions often intervene in NLRB proceedings in order to press complaints of unfair labor practices against employers . . . Unfair labor practice cases against unions have supplanted employers' private suits for injunctions against unlawful strikes, boycotts, and picketing." S. Doc. No. 81, n. 6, *supra,* at p. 5.

As thus noted, the realities of Labor Board proceedings, and judicial review of those proceedings, indicate a clash of private interests seeking vindication of statutory rights before impartial public tribunals. The independent General Counsel,[7] with an eye on his docket, his case load, and his over-all responsibilities, aids first one party and then another. Both the General Counsel and the Board represent the over-all public interest in umpiring the individual private rights of management and labor. Such umpiring in the public interest does not detract from the private rights which warrant intervention in the court below.

[7] Section 3(d) of the Act creates a General Counsel of the Board, appointed by the President, with "general supervision over all attorneys employed by the Board" and "final authority . . . in respect of the investigation of charges and issuance of complaints".

A. *The Labor Act Recognizes Private Rights Within A Framework of the Public Interest*

Underlying the decision below and central to the policy of the Board in opposing intervention by a charging party who had prevailed in Board proceedings is the assumption that only public rights are involved under the Act and that no private rights or interests are in focus at the appellate review stage; hence any interest of the charging party is necessarily encompassed by the public rights assertable only by the Board and intervention by the charging party becomes inappropriate. But this public interest/private rights dichotomy is too wooden an answer to the viable issues here presented. As Mr. Justice Frankfurter commented in *Labor Board* v. *Avondale Mills,* 357 U.S. 357 at 364: "Mechanical answers will not avail for the solution of this non-mechanical complex problem in labor-management relations".

The "public rights" concept has had an evolutionary development, a development which indicates that there is no inconsistency in permitting intervention by private parties in NLRB review proceedings.

The rights to self-organization and to collective bargaining long antedated the Wagner Act of 1935. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184; *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1; *Texas & N.O.R. Co.* v. *Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548. These rights were "protected" by Congress in the Wagner Act, and the legislative history concerning the public interest/private rights dichotomy shows that no one thought to foreclose judicial intervention by private parties when their "protected rights" were at stake.

The bill originated in 1934 with a proviso that Labor Board orders would be enforced in the District Courts by the United States Attorneys "at the request of the

National Labor Board" (Legislative History of the National Labor Relations Act, 1935, p. 4). This procedure was similar to that authorized by the labor provisions in the National Industrial Recovery Act (Id. at p. 534). Francis Biddle and others with experience testified against the difficulty and delay of "trial de novo" in the District Courts (Id. at p. 2650), and employer witnesses challenged the constitutionality of a procedure without trial *de novo*. They alleged a Seventh Amendment right to trial by jury, and referred to court decisions requiring a judicial trial in reparation proceedings under the Interstate Commerce Act and under the Packers and Stockyards Act (Testimony of Robert F. Colley, of the American Rolling Mill Co., Id. at 1831; testimony of James A. Emery, General Counsel of the NAM, Id. at 2235). The NAM spokesman distinguished the situation under the Federal Trade Commission Act because that Act involved the "enforcement of public rights, which in their nature do not require judicial determination" (Id. at 2236).

This "public rights" concept was at once adopted by the bill's champions, and the provisions for *de novo* trials and District Court enforcement by the United States Attorneys were eliminated in favor of the Court of Appeals enforcement route of the Federal Trade Commission Act (Id. at 2295). The final House Report, for example, makes this explanation of the judicial enforcement and review provisions:

> "The procedure provided is analogous to that in the Federal Trade Commission Act and is familiar to all students of administrative law . . . The most frequent form of administrative action required in cases of this type is specifically provided for, i.e., the reinstatement of employees with or without back pay, as the circumstances dictate. No private right of action is contemplated. Essentially the unfair labor

practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint . . .". (Id. at 2931).

Thus, the "public rights" concept originated to forestall the delay incident to "jury trials".[8] It was intended and has been applied to give exclusivity in certain areas of Labor Board proceedings, joint participation in others. This is and has been the statutory pattern. There is shared responsibility with primary authority vested at various stages first here and then there, first in the private domain and then the public.

Private parties, as petitioner Union here, initiate the Labor Board proceedings with the filing of a charge. The General Counsel of the Board has the "final authority" to investigate the facts underlying the charge, and to determine whether a "complaint" shall issue. Section 3(d). Upon the General Counsel's issuance of a complaint, the cases moves into the province of the Labor Board which may amend the complaint "in its discretion at any time prior to the issuance of an order based thereon". Section 10(b). The Labor Board may dismiss a complaint, or may issue an order based thereon; and "until a transcript of the record in a case shall have been filed in a court", the Labor Board may "modify or set aside . . . any order made or issued by it". Section 10(d). When the case moves on to appellate review, "the jurisdiction of the court shall be exclusive". Section 10(e).

Such in skeletal form is the statutory outline dividing the functions of the respective parties and agencies of government. But this statutory form is not complete.

[8] See e.g. the holding in *Labor Board* v. *Jones & Laughlin Steel Corp.* that an order to reinstate with back pay is not a "suit at common law" requiring a jury trial within the meaning of the Seventh Amendment. 301 U.S. 1, 48.

There is super-imposed a judicial gloss. Despite the statutory finality given the General Counsel and the Labor Board, the rights of private parties are preserved. Private parties are entitled to participate in the proceedings leading up to Labor Board compromise and settlement of pending cases. *Textile Workers Union of America, AFL-CIO* v. *National Labor Relations Board*, 294 F.2d 738 (App. D.C.); *Retail Clerks Union 1059* v. *National Labor Relations Board*, — F. 2d — (App. D.C., decided June 29, 1965); *Marine Engineers' Ben. Assn.* v. *NLRB*, 202 F.2d 546 (C.A. 3).[9] Private parties are entitled to seek court review to protect their interests if the Labor Board certifies a bargaining unit in violation of statutory command, *Leedom* v. *Kyne*, 358 U.S. 184; if the Labor Board refuses to exercise jurisdiction where jurisdiction exists, *Hotel Employees Local No. 255* v. *Leedom*, 358 U.S. 99; or if the Labor Board exercises jurisdiction where jurisdiction does not exist, *McCulloch* v. *Sociedad National*, 372 U.S. 10. Thus, even in the area of representation elections and unfair labor practices, this Court has recognized the existence of "private rights" and the consequent standing of injured parties to initiate and to participate in judicial review of Board action.

There are other areas where private rights and public interest concepts interblend, the areas of arbitration and judicial redress for breach of contract. Section 10(a) provides that the power of the Board to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise". Read literally, this would require all situations involving

[9] Of course, the private charging parties have no veto right over amendments to the complaint or compromise settlements once the Board has considered and explained reasons for rejection of the contentions made. See, e.g. *Local 282, International Brotherhood of Teamsters* v. *N.L.R.B.*, 339 F. 2d 795 (C.A. 2).

unfair labor practices to be adjudicated before the Labor Board. But this section is not read literally;[10] other sections of the National Labor Relations Act indicate further congressional policies. Title II, which created the Federal Mediation and Conciliation Service, declares that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing bargaining agreement". Title III allows suits by and against labor organizations in judicial forums. Indeed, the Company in this case urged before the Board that the Union should go to arbitration on its demand for time studies and the NLRB trial examiner found the Union's only recourse "in arbitration or in litigation". 146 NLRB at 1585. Had the Union followed this suggestion, it would be a party before the courts. The rights to be vindicated are identical whether the Union went the Labor Board route or the arbitration route suggested by the Company and the trial examiner.

In the *Steelworkers'* trilogy, 363 U.S. 564, this Court praised the grievance machinery under collective bargaining as "the very heart of the system of industrial self-government". *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581. When conflict arose between the private system of arbitration on the one hand and the exclusivity of the Labor Board remedies on the other, this Court saw no jurisdictional problem. The Court acknowledged the right of private parties to initiate and control arbitration and/or judicial action even when the issues involved were appropriate subjects for Labor Board action. *Smith* v. *Evening News Association*, 371 U.S. 195 (an unfair labor practice concededly within the jurisdic-

[10] See Harris, The National Labor Relations Board and Arbitration, the Battle of Concurrent Jurisdictions, 16 Syracuse L. Rev. 545 (1965).

tion of the Labor Board); *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (a question of "bargaining unit" where an alternative remedy before the Board was available).[11]

Thus, the statutory pattern does not require a formal or rigid distinction between public interests and private rights. The two may go hand in hand. In the 1947 Taft-Hartley amendments, Section 10(1) was added requiring the Labor Board to seek judicial injunctive relief against certain types of union unfair labor practices. Senator Taft explained that in these suits, the Labor Board acts "in the public interest and not in vindication of purely private rights." Legislative History of the Labor Management Relations Act, 1947 at p. 414. But despite the recitation of the "public interest" concept, the statute itself requires that notice of the Board's petition for an injunction "be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony."

This Court's decision in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (the chief authority relied upon below), does not require a formal or rigid distinction between public interests and private rights in each and every instance. There, this Court demonstrated flexibility in this regard. The Court held that private parties who initiate unfair labor practice charges lack standing to seek contempt action by the court which enforces the Labor Board order; but this Court in the same

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[11] In the *Carey* case, the brief of the United States conceded that "the existence of NLRB remedies does not preclude seeking a judicial or arbitrable remedy for the same or an overlapping controversy over the terms of a collective bargaining agreement . . . The bare fact that IUE might have sought similar relief under Section 8(a)(5) would not oust the court of jurisdiction to enforce the agreement to arbitrate". Brief, pp. 24-25.

decision acknowledged the right of the same private parties to intervene in the appellate review proceedings when the merits of the Labor Board decision were in issue. 309 U.S. at 263. The distinction between private interest to intervene and private interest to seek enforcement of court orders was reiterated in *International Union* v. *Eagle-Picher Mining Co.*, 325 U.S. 335, 338-39: "the petitioners, though they could not have instituted enforcement proceedings, had standing to seek review of the order denying the Board's petition."

That the Act reflects a public concern with the prevention of unfair labor practices and that the Board acts in certain instances as the sole and exclusive representative of that public interest are propositions that have been stated and restated in a variety of contexts by this Court.[12] But this Court in *Garner* v. *Teamsters Union*, 346 U.S. 485, warned against the seductive assumption that this dichotomy between public and private rights provides an answer to all assertions of private claims under the Act. "It often is convenient to describe particular claims as invoking public or private rights, and this handy classification is doubtless valid for some purposes. But usually the real significance and legal consequences of each term will depend upon

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[12] "The Board acts in a public capacity to give effect to the declared public policy of the Act," said the Court in *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 362, and the proceeding before the Board is accordingly "not for the adjudication of private rights." And the Board must be guided in its actions by the interests of the public; to permit those actions to be confined or controlled by private interests "would reduce the statutory machinery to a vehicle for the vindication of private rights," which "would be alien to the basic purpose of the Act." *Labor Board* v. *Fant Milling Co.*, 360 U.S. 301, 307. Moreover, the remedies appropriate or necessary to effectuate the public interest must be fashioned by the Board with due regard to the fact that "The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies." *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194; and see *Republic Steel Corp.* v. *Labor Board*, 311 U.S. 7, 11-12; *Nathanson* v. *Labor Board*, 344 U.S. 25, 27.

its context and the nature of the interests it is invoked to distinguish." 346 U.S. at 494. The term "public rights," the Court noted, has a variety of meanings as distinguished from "private rights". In the area of federal labor law, however, "the most usual differentiation is between the legal rights or duties enforced through the administrative process and those left to enforcement on private initiative in the law courts"—a distinction which "consists of substituting federal statute law applied by administrative procedures in the public interest in the place of individual suits in courts to enforce common-law doctrines of private right." 346 U.S. at 495-496.

It is within this context that the Court has spoken of the National Labor Relations Act as creating public rather than private rights. In every such instance the Court was dealing with an effort to assert a private claim which was either inconsistent with the statutory pattern or entirely outside the ambit of the statutory concern. Thus it became pertinent to note that the Act creates no "private right" to pursue a claim in such a manner.

The exclusive power which Congress has given to the Board to control certain crucial steps of its unfair labor practice procedures has given rise to many such statements as to the absence of private rights. As was pointed out in the *Amalgamated* case, 309 U.S. at 265, "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief." Accordingly, there can be no "private right" to control the Board's prosecution of an unfair labor practice case; to recognize such a right would be inconsistent with the exclusive powers given the Board.

The *Amalgamated* case is the perfect example of the nonexistence of such a "private right." There the union that had originally charged an employer with committing an

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unfair labor practice sought to have a court of appeals adjudge the employer guilty of contempt of the court decree enforcing the Board's order against the employer. Such an effort by a private party was completely inconsistent with the exclusive power lodged in the Board to secure enforcement of its own orders. When this Court emphasized that the Board was a public agency acting in the public interest and that Congress contemplated no private right of action in this area, 309 U.S. at 264, 267, it was underlining the proposition that within the statutory range there is no "private right" to secure enforcement of a Board order through contempt action. Enforcement of such an order is exclusively the function of the Board. "The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy,' " 309 U.S. at 269.

Contrariwise, in the *National Licorice* case, 309 U.S. 350, an effort was made by individual employees to secure an administrative determination, through participation in Board proceedings, of their private rights under a contract. In a situation where the exclusive public concern with the contract was with its use by the employer as a means of thwarting the bargaining rights of a union, this Court held that the Act provided no means for adjudicating such private claims of the individual employee signatories. But the Court was careful to note that the Act "does not foreclose the employees from taking any [other] action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication." 309 U.S. at 365.

Another facet of this refusal to recognize "private rights" under the Act is illustrated by the decision in *Garner* v. *Teamsters Union, supra,* where this Court was careful to make clear the need for delineating such rights in their context and in light of the nature of the interests sought to be distinguished. In that case an employer sought to obtain a state court injunction against peaceful

picketing, a matter which was within the Board's exclusive jurisdiction under the National Labor Relations Act. The employer sought to justify this effort on the theory that he was invoking a state equity power to protect a private right, whereas the Board was concerned only with enforcing a public right on behalf of the public interest. While it was questionable whether the state remedy was properly labeled one for the protection of private rights, the Court made plain that any such private right enforceable in a state court could not be recognized; the federal statute was supreme and could not be curtailed or circumvented by any such assertion of a private right. The public interest embodied in the Act was thus found to be both exclusive and supreme. 346 U.S. at 500-501. In this sense, the preemption doctrine recognized by this Court can be stated as a rejection of any "private right" to obtain relief in a forum and in a manner contrary to the Congressional mandate that the matter in issue be pursued only before the Board. See, e.g., *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Plumbers' Union* v. *Borden*, 373 U.S. 690.

In other words, the repeated emphasis upon the public interest involved in the Act and the Board's exclusive function in enforcing that public interest is simply a means of distinguishing and rejecting private efforts to disturb the Board's exclusive functions, to utilize the Board's procedures for adjudicating claims outside the statutory reach, or to prosecute claims in other forums which cut across matters preempted by Congress. The public interest concept is but a shorthand method of referring to those aspects of the Act relating to the exclusivity of the Board's jurisdiction and procedures. *It does not imply the absence of private interests or claims within the public arena.* Nor does it exclude the possibility that, consistent with the Act, certain private rights may be pursued either before the Board or alternatively before some other forum. See

Carey v. *Westinghouse Corp.*, 375 U.S. 261, 268, holding that a union's suit in a state court to compel arbitration regarding a representation matter was permissible; "a suit either in the federal courts, as provided by § 301 (a) . . . or before such state tribunals as are authorized to act . . . is proper, even though an alternative remedy before the Board is available . . ." See also *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448; *Smith* v. *Evening News Assn.*, 371 U.S. 195.

More importantly, there has not been and there cannot be any denial of the self-evident fact that the proper execution of the public policies of the Act, pursuant to the exclusive procedures of the Board, necessarily involves and effects the interests and rights of private parties under the Act. Private rights in this sense and in this context mean those rights which Congress has recognized as proper subjects of public concern and Board action and which the private parties are free to assert and to pursue. They are to be distinguished from those private claims which upset the statutory mechanisms or which are not the subject of public or statutory interest.

Indeed, the whole concern of this Act is to recognize, in the public interest, reciprocal rights and obligations of both labor and management. Those rights and obligations are the very content of the Act. Section 7 of the Act, 29 U.S.C. § 157, for example, expressly recognizes the "right" of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities . . . and . . . to refrain from any or all of such activities . . ." And Section 8, 29 U.S.C. § 158, creates a host of obligations and correlative rights as to both employers and unions; the duties and restraints therein imposed by way of prohibiting unfair labor practices create a manifold compendium of private interests subject to statutory adjudication.

The existence of this statutory type of "private rights" was made even more evident by the Taft-Hartley amendments in 1947, which imposed a series of obligations and restrictions on unions. The Act then became a body of bilateral rights and obligations with respect to unions and employers, with the Board assuming an even more pronounced role of adjudicating the conflicting claims of these private parties under the Act. As noted above, the Advisory Panel on Labor-Management Relations Law commented that:[18]

> ". . . although proceedings before the NLRB are undertaken in the public interest, since 1947 they have also been concerned with the vindication of essentially private rights. The Board is . . . largely an umpire engaged in enforcing established rules first against one party and then against the other."

To assert, protect or defend one's statutory rights in a manner consistent with the public policies and procedures lies at the very heart of the statutory scheme. In this context, therefore, "private rights" have "real significance and legal consequence," *Garner* v. *Teamsters Union*, 346 U.S. at 494, which are the proper concern of the Board and of reviewing courts.

B. *There Are Very Real Private Rights at Stake in This Case*

In this case the petitioner Union has a very substantial private interest at stake within the statutory framework. Basically the right involved is that recognized in § 7 of the Act, the right to bargain collectively with an employer. The charge was that, in violation of § 8 (a) (1) and (5), the respondent Company had infringed that right

[18] S. Doc. No. 81, 86th Cong., 2d Sess. (1960), p. 5.

by withholding information (available through the requested time studies) which would make the bargaining meaningful and would enable the Union to police and administer agreements reached through bargaining. Only with such information, as the Board found (146 NLRB at 1585), could the Union "fulfill its function as the bargaining representative".

At least twelve times during the course of the Board's opinion the Union's interest in this matter is referred to as a statutory right of the Union. See 146 NLRB at 1585-1587. The opinion is replete with such references as the Union's "statutory right to such information," its "statutory claim to the information sought," the employer's "denial of rights guaranteed under the Act," and "the denial of the statutory right here involved".

This right, this interest of the Union, was at all times pursued within the procedural framework of the Act. As a charging party, the Union was confined under the Act to the function of presenting a charge to the Board; and the Board thereafter had the exclusive functions of investigating, issuing a complaint, conducting a hearing and resolving the issue, followed by enforcing any affirmative order that might be issued against the employer. While it may be said that the Union's statutory right became impressed with public policy considerations, enabling the Board to recognize and enforce it, that right or interest remained as an object of parochial Union concern. The Union had the recognized right to participate in the hearings as a party, to file exceptions to any order of the trial examiner, and to file a petition for reconsideration to an order issued by the Board; and further, had the Board declined to recognize the statutory claims in any particular of the four jobs in dispute, the Union, as an aggrieved party, would have had the statutory right to seek vindication by judicial

review under Sec. 10(f). *Albrecht* v. *NLRB*, 181 F. 2d 652, 654 (C.A. 7).[14]

The very real concern of the Union, its interest in securing recognition of its statutory right, lost none of its force by virtue of the Board's decision acknowledging and enforcing that right. The critical fact is that the Union's rights under the statute were an integral part of the whole proceeding. Those were the rights that were adjudicated by the Board, as well as the employer's obligation to respect those rights. And should the court below, on petition by the employer, reverse the Board's decision, the Union's statutory rights will be effectively adjudicated and denied.

Here, then, is a very substantial right or interest of the Union at issue in the appellate court proceedings. It is a right that falls within the public policies of the Act, one that has been pursued within the procedural framework of the Act. The Board's exclusive function with respect to the enforcement of that right has at all times been acknowledged. Hence it is the kind of "private right" which can and has been recognized by the Act. And it is the kind of a "private right" so intimately connected with the private concerns of the Union as to justify intervention by the Union in the *Board* proceedings. No less should it be considered as a right so directly involved with the Union's legitimate interests as to require intervention in the *appellate court* proceedings.

Moreover, this "private right" is one to be adjudicated both by the Board and the reviewing court not in abstract terms but as a viable proposition from which legal and statutory consequences flow. See *Rochester*

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[14] The Union had the alternative right under *Smith* v. *Evening News Association*, 371 U.S. 195, and *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, to take its contractual claim to arbitration and from thence to court.

Telephone Corp. v. United States, 307 U.S. 125, 131-132, 143; *Pennsylvania R. Co.* v. *United States,* 363 U.S. 202, 205. If the reviewing court agrees with the Board, the Union will have an authenticated statutory right to demand its own time studies and the Company will be legally obligated to recognize that right. But if the court reverses the Board, the Union loses that right and the Company is freed of any duty to recognize it. Thus the matter in issue before the court below is immediately and legally consequential to the petitioner Union. *Associated Industries of New York* v. *Ickes,* 134 F.2d 694 (C.A. 2); *National Coal Ass'n.* v. *Federal Power Commission,* 191 F.2d 462 (App. D.C.).

In these circumstances, to view the right asserted by the Union as a private matter outside the legitimate concern of the Act is to deny the interrelationships of public and private interests implicit in the statute. The interest which the Union seeks to protect through intervention in the court below has both public and private connotations. And to assert those private connotations in a § 10(f) review proceeding, following their assertion before the Board, is entirely consistent with the pattern, the purpose and the policy of the Act. That consistency, combined with the obviously substantial nature of the asserted right, makes the requested intervention both appropriate and necessary to the full exercise of the court's review power under § 10(f).

C. *Practical Considerations Require Intervention, Upon Request, by a Party Charging Violation of the Labor Act.*

As just indicated, the petitioner Union, as the charging party before the Board, has a substantial interest in the adjudication of its statutory rights. That interest retains its vitality not only in the Board proceedings but

also in any judicial review proceedings under § 10(f), even where the latter proceedings are instituted by the other or "aggrieved" party. The fact is that the statutory rights and claims of such a charging party will in effect be examined by the appellate court and be either recognized or disallowed. That fact generates several practical reasons why intervention should be allowed to the charging party as a matter of effective and expeditious administration of § 10(f).

(1) *The ineffectiveness of subsequent proceedings to protect the charging party's interest.* As in the *Scofield* case, where the charged party's interests are at stake, a determination by the appellate court in this case that the petitioner Union, as the charging party, has no statutory rights with respect to its demand for leave to conduct time studies would have a most prejudicial effect upon any future proceedings. Were the Board order to be reversed and the case remanded to the Board with directions to dismiss the complaint, as the respondent Company urges, the petitioner Union would suffer a substantial injury. The Union would be faced with the loss of its claimed statutory rights and its self-interest in making the time studies.

The Board, however, would then be powerless to consider anew any reiteration of the Union's claims; it would be bound by the appellate remand order to dismiss the complaint. The Union, however, could assume under § 10 (f) the role of a party "aggrieved" by the Board's new dismissal order, but the prospects of any independent or meaningful judicial review of such a dismissal order would be quite minimal. The doctrine of *res judicata* would technically not apply, the Union not having been a party to the earlier review proceedings. But, as the Solicitor General has pointed out in the *Scofield* case with reference to such a subsequent appeal by a charged

party,[15] "as a practical matter the second proceeding would be controlled by the facts found and the legal conclusions reached in the first proceeding". See, e.g., *Henry I. Siegel Co.* v. *NLRB*, 340 F.2d 309, 310 (C.A. 2), where the Second Circuit followed its prior decision, 324 F.2d 228, "as the law of the case" and confined its review "to the two issues determined by the Board on remand."

Thus a judicial determination in this case that the respondent Company has not violated § 8(a)(1) and (5) because the Union has no statutory right to make its own time studies would make empty any subsequent appeal by the Union. Such an appeal would constitute but a futile attempt to have the same or another appellate court rehear and relitigate an issue already decided. The Union would have an intolerable burden of overcoming the established precedent. Such a judicial mirage is certainly no substitute for the right to be heard here and now. See *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327, 330-331. Without according the Union the right to assert and to litigate its interests at this juncture, there can be no assurance that those interests will ever be objectively considered in the light of the Union's contentions or that they will be given the weight in appellate proceedings to which they are entitled.[16]

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[15] Memorandum for the National Labor Relations Board, p. 3, in connection with the Petition for a Writ of Certiorari, *International Union* v. *Scofield*, No. 18, Oct. Term 1965.

[16] This is not to say that the Labor Board attorneys cannot present all relevant legal arguments. But there is more here than statutory construction and legal precedent. In this case, the respondent Fafnir supplied the petitioner Union the results of its own time studies of the four jobs in issue. To succeed in its case, the petitioner Union must demonstrate the necessity for its own time studies. This requires that the reviewing court be informed, knowledgeably, about the techniques of time studies: the ten essential steps in all time study procedure, the types of judgment to be exercised in regard to each step, the alleged judgment errors of the

(2) *The desirability of hearing all interested parties simultaneously and avoiding multiplicity of proceedings.* The most effective and expeditious determination of issues on an appeal, to use the words of this Court in *United States* v. *Louisiana*, 354 U.S. 515, 516, "requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." That principle would seem peculiarly appropriate to the effective resolution of the judicial review proceeding now pending in the court below.

As has been indicated, this entire case centers about the validity of the demand by the petitioner Union that it be allowed to conduct certain time studies. The resolution of that issue, as the Board's opinion demonstrates, involves such matters as the Union's need to conduct the studies in order to judge the accuracy of the Company's studies and to make an intelligent decision whether to proceed to arbitration, the possible interference with production that such Union studies might entail, the possible waiver by the Union of its right to seek such information, the past history of the Union's requests, and the possible alternative sources where the Union might acquire such information. All of these matters are intimately bound up with the Union's self-interests. And the Union can be expected to provide, as it did before the Board, considerable enlightenment upon these various factors that are so critical to the reviewing court's determination. However effective Board counsel may be in reflecting these interests of the Union, the fact remains that it is the Union that knows the most facts in this connection and can best explain their implications to the Union.

To permit intervention by the Union in this type of case "would serve the ends of justice," *Textile Workers Union*

Company in regard to the four jobs at issue, and so on. Information on this score is obviously more accessible to the Union attorneys than to the Labor Board attorneys.

of America v. *Allendale Co.*, 226 F. 2d 765, 770 (App. D.C.), by bringing to the aid of the appellate court the most knowledgeable as well as the most directly affected of the parties involved. In any meaningful sense, this is a tripartite proceeding involving (1) the Board, as the representative of the public interest, (2) the respondent Company, the party charged with having violated the Union's statutory rights, and (3) the petitioner Union, the party whose statutory rights are not only involved but are decisive of the case. To reject the participation of any of those parties, all apart from jurisdictional or equitable considerations, is to deprive the court of the assistance of a vital participant in the controversy. The petitioner Union, for example, may well have supplied the Board with the factual elements and arguments that were in part used in the resolution of the case; and it may provide the insight and the analysis conducive to a full understanding and proper resolution of the case by the appellate court. Certainly in these circumstances no prejudice to the court or to the other parties or to the prompt and effective resolution of the appeal would result from the Union's intervention and participation.

To include the Union as an intervener, bound by the results of the judicial review proceeding, would be further consistent with the sound administration of § 10 (f) by avoiding multiplicity of proceedings. It would eliminate the possibility as well as the futility of the Union seeking an additional appeal from a Board order dismissing the complaint, should the appellate court now reverse the Board's outstanding decree, and raising anew its statutory claims. Such a consideration strongly supports the propriety of permitting intervention at this stage. *Textile Workers Union of America* v. *Allendale Co., supra.*

(3) *The desirability of permitting the charging party to have the full appeal rights of a party to the case.* Pre-

cisely because a charging party has statutory rights, claims and interests that are directly involved in the appellate review proceeding, it becomes a matter of fundamental fairness if not due process to permit him to intervene as of right. It being apparent that such a party's statutory rights are about to be authoritatively adjudicated, the accepted notions of appellate court equity require that "all parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal." *Davis* v. *Mercantile Trust Co.*, 152 U.S. 590, 593.

This "opportunity to be heard on such appeal" means, of course, something more than leave to file a brief *amicus curiae*. It means full participation as a party, with the right to participate in the designation of the record, in the pre-hearing conference where issues are simplified, to make motions, file briefs, argue orally, and seek rehearing. And it means the right to have status to seek certiorari from this Court in order to accord the party's interest the benefits of the entire appellate process. Only a party who is named as such or who is allowed to intervene can have those full rights; an *amicus curiae* does not possess them.[17] And only a party possessing all those procedural rights can fully and effectively represent its interests at issue in the proceeding.

The standing to seek the ultimate review of a case by this Court is critical to the effectuation of the legal and statutory interests of the petitioner Union. As an intervener, the Union would have the right to invoke this Court's certiorari power. *International Union* v. *Eagle-Picher Min-*

[17] An *amicus curiae* is generally thought of not as a party who is directly involved in the case but as a party with a case or interest similar to or identical to the one actually before the court. The *amicus curiae* concept has also been utilized on behalf of organizations with general rather than direct interests in the case at hand. See Wiener, The Supreme Court's New Rules, 68 Harv. L. Rev. 20, 80 (1954).

ing Co., 325 U.S. 335, 338-339. And it could seek it in circumstances where the Board might decide not to ask for such review. See *United Steelworkers* v. *Labor Board*, 376 U.S. 492. But if the Union were denied intervention below and the Board were to decide not to seek this Court's reversal of an adverse appellate decision, the Union would be effectively foreclosed from carrying its timely claims to this Court, claims which of necessity are the very core of the proceeding.

Permitting intervention below would have the further advantage of assuring that all parties in interest would be before this Court when any attempt is made to secure a writ of certiorari and when, if certiorari is granted, a full review of the case is undertaken. Just as the lower court would benefit from the participation of all such parties, so too the effective determination of the issues "requires that they be adjudicated in a proceeding in which all the interested parties are before this Court." *United States* v. *Louisiana*, 354 U.S. 515, 516. To truncate the effective representation of the interests at stake in this Court by omitting a vital party is to drain the certiorari case of an essential element and to make this Court's task more difficult. And to force the omitted party to seek some other and perhaps futile means of securing review of its claims—at a point divorced in time from the present proceeding—is to weaken still further that party's chances of a meaningful presentation of its claims to this Court.

Intervention below thus means that the entire controversy will be centralized and confined in one proceeding, enabling both the court below and this Court to review all the relevant issues in the light of the contentions of all the interested parties—including the accused wrongdoer and the injured accuser.

(4) *The desirability of eliminating fortuity as the decisive factor in the charging party's right to participate in the appellate proceeding.* There could be no question as to

the charging party's status as an "aggrieved" party under § 10(f) had the Board dismissed the complaint against the respondent Company. See *Albrecht* v. *N.L.R.B.*, 181 F.2d 652, 654 (C.A. 7). Then the Union would have had the right to seek judicial review of the dismissal and to participate in the case as a full-fledged party. And in that event the charging party could seek or oppose this Court's ultimate review of the case.

Yet the statutory claims and rights that the Union would be asserting as such an "aggrieved" party are precisely the same as the claims and rights it is now seeking to assert. Those claims and rights are imbued with the same "public interest" in either instance. The only difference is that no one would question the right of the Union to pursue those statutory or private interests had the Union, as the charging party, lost its case before the Board. But because the Union was able to convince a majority of the Board that its statutory rights should be recognized and that the respondent Company had violated those rights, the court below and the Board assert that the Union has no interest at stake to justify intervention.

Permitting the fortuity of the administrative determination to control the right of intervention injects a most capricious element into the Congressional policy of adjudicating the conflicting claims of labor and management in this area. And when there is added to that chance circumstance the additional fortuity that the respondent Company, as the "aggrieved" party seeking review, chanced not to name the Union as a party on appeal (as it could have done), the resulting denial of intervention becomes a most incongruous action. Intervention should be based upon the substantial factor of the Union's direct involvement and interest in the proceeding, a factor that recognizes reality rather than fortuity.

(5) *The desirability of allowing intervention in order to*

conform to the general Congressional policy favoring intervention. Congress on numerous occasions has exhibited a strong policy favoring intervention in both administrative and judicial proceedings by parties directly involved and affected thereby. Section 10(b) of the Act, 29 U.S.C. § 160(b), directs the Board to exercise discretion in allowing intervention in Board proceedings, a direction that the Board has interpreted (Rules and Regulations, Sec. 102.8) as giving the charging party full status on a parity with the charged party. And in providing in § 10(1) of the Act, 29 U.S.C. § 160(1), for certain injunctive proceedings pending completion of the unfair labor practice procedure before the Board, Congress made plain that the Board's petition for judicial relief should be served "upon any person involved in the [unfair labor practice] charge and such person, *including the charging party,* shall be given an opportunity to appear by counsel and present any relevant testimony." [Emphasis added.]

Moreover, in providing for judicial review of the actions of such agencies as the Interstate Commerce Commission, the Atomic Energy Commission, the Federal Communications Commission and other agencies covered by the Urgent Deficiencies Act of 1913, Congress has directed that all parties in interest in the administrative proceedings be allowed to intervene on their own motion and as of right in the judicial review proceedings. See 28 U.S.C. § 2323; 5 U.S.C. § 1038. These provisions constitute the major expression of Congress on the matter of intervention in these circumstances. And the expression is one of acknowledging and guaranteeing an absolute right of intervention for those who have an interest in and were parties to the administrative proceedings.

As stated in the petitioner's brief in the *Scofield* case, this broad intervention policy adopted by Congress must be viewed as grounded upon the considerations of equity

and fairness which necessarily adhere to the demand of an interested party to be heard. And when that policy is added to the same policy enunciated in Rules 19 and 24 of the Federal Rules of Civil Procedure, dealing with the concepts of indispensable parties and intervention in federal district courts, it becomes reasonable to read that policy into the judicial review provisions of § 10(f) of the National Labor Relations Act. The silence of § 10(f) with respect to intervention cannot be taken as a rejection of the uniform policy favoring intervention adopted whenever Congress expressly directed its attention to that subject.

(6) *The inappropriateness of distinguishing the intervention rights of a charging party from those of a charged party.* The foregoing practical considerations dictate the propriety of allowing intervention as of right to the party who has initiated the charge before the Board and whose statutory rights and interests are directly in issue. In this context, the relevant considerations are virtually identical to those which underlie the appropriateness of allowing the charged party to intervene in the appellate proceedings.

The Board, however, seeks to distinguish the two situations, urging that intervention by the charging party would endanger the integrity of the statutory pattern whereas intervention by a charged party would not. See Brief of the Board, pp. 7-8, 21-25, 26-30. Such a distinction is without foundation. Intervention in either situation would have the same practical consequences—the intervener could participate in the designation of the record, file a brief, present oral argument, and possibly petition for certiorari. To say, as the Board does (Brief, pp. 28-30), that the charging party would be more likely than the charged party to block settlement of a case or to prolong the litigation contrary to the wishes of Board counsel is

to engage in a fanciful conjecture. The right to intervene rests upon more solid foundation than speculation as to whether the intervener will cooperate with Board counsel or will expedite the litigation. A court has the power to control such matters, whatever position individual counsel may take as to the progress of a case. Intervention rests on a recognition of the real interests in issue and the fairness involved in resolving a case when all affected parties are before the court. On that basis, no valid distinction can be made between a charged party and a charging party.

In sum, the Board's brief concedes the power of this Court to require the intervention of the charging party and simply makes a naked plea of inconvenience.[18] But such a plea weighs little in the scales when balanced against the rights and policy considerations requiring intervention. As concluded by the distinguished Advisory Panel quoted earlier (p. 16, *supra*), "any party to NLRB proceedings should be allowed to intervene in the appellate proceedings."

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[18] Appendix C of the Government's brief indicates that no distinction is made between a charged and a charging party in the judicial review provisions of other administrative agencies. Congress has either made specific statutory provision for intervention by all parties in interest (Brief, pp. 45-47), or, in the absence of explicit statutory direction, the agencies consent to the intervention by interested parties and the courts generally grant intervention (Brief, pp. 48-49). The Government seeks to distinguish Labor Board review proceedings from the judicial review proceedings of all other administrative agencies on the basis of case-load and volume (Brief, p. 44), but "budgetary or other administrative reasons" do not justify denial of statutory rights. *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1.

Conclusion

For these various reasons, the judgment below should be reversed with directions to permit the petitioner Union to intervene as of right in the proceedings pending in the Court of Appeals.

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(5968-3)

SUPREME COURT OF THE UNITED STATES

Nos. 18 AND 53.—OCTOBER TERM, 1965.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, Local 283, Petitioner, 18 *v.* Russell Scofield et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, UAW, AFL–CIO, Petitioner, 53 *v.* The Fafnir Bearing Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 7, 1965.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The two cases before us present converse sides of a single question—whether parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the Court of Appeals review proceedings.

In No. 18 (*Scofield*), the Union Local was charged by four individual employees with violations of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.* (1958), for fining certain Union members for exceeding incentive pay ceilings set by the Union. The General Counsel of the Board issued a complaint. After a full hearing, the Board dismissed the complaint, 145 N. L. R. B. 1097. The individual employees then sought review in the Seventh Circuit.

The General Counsel filed an answer supporting the decision. At this point, the Union filed a timely motion of intervention, alleging that it would be directly affected should the appellate court set aside the Board's decision and direct the entry of a remedial order against it. Neither the individual employees nor the Board opposed intervention. A division of the Seventh Circuit denied the motion to intervene, but authorized the Union to file a brief as *amicus curiae* without leave to participate in oral argument. The Union sought review here, and we granted certiorari to review the denial of intervention because of the importance of the issue and the conflict among the Circuit Courts, 379 U. S. 959. Further proceedings were stayed pending the completion of our review.

In No. 53 (*Fafnir*), the Local filed unfair labor practice charges against The Fafnir Bearing Company. The charging party alleged that the company had violated its statutory bargaining obligation by refusing to permit the contracting Union to conduct its own time studies of job operations in the plant. The Union allegedly needed to conduct these studies to ascertain whether it should proceed to arbitration. The General Counsel issued a complaint, a hearing was held, and the Board entered a cease-and-desist order against the company, 146 N. L. R. B. 1582. The company petitioned for review in the Second Circuit, and the Board filed a cross-petition for enforcement. The Union—the successful party before the Board—moved to intervene, alleging numerous grounds in support. Both the company and the Board opposed intervention. The Second Circuit denied the motion, although cognizant of the difficulties of the problem, and authorized the Union to file an *amicus* brief. 339 F. 2d 801. We granted certiorari, 380 U. S. 950, and consolidated *Fafnir* with *Scofield* in order to consider both facets of the intervention problem.

We hold that both the successful charged party (in *Scofield*) and the successful charging party (in *Fafnir*) have a right to intervene in the Court of Appeals proceeding which reviews or enforces Labor Board orders. We think that Congress intended to confer intervention rights upon the successful party to the Labor Board proceedings in the court in which the unsuccessful party challenges the Board's decision.

A threshold question concerns our jurisdiction to grant certiorari. Under § 1254 (1) of the Judicial Code,[1] only a "party" to a case in the Court of Appeals may seek review here. In both these cases, the Union seeking certiorari was denied intervention and relegated to the status of an *amicus curiae*. Because an *amicus* is not a "party" to the case, it would not have been entitled to file a petition to review a judgment on the merits by the Court of Appeals, *In re Leaf Tobacco Board*, 222 U. S. 578, 581; *Ex parte Cutting*, 94 U. S. 14, 20–22. In view of our decision herein, we think that § 1254 (1) permits us to review the order denying intervention. See *Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519.

I.

Congress has made a careful adjustment of the individual and administrative interests throughout the course of litigation over a labor dispute. The Labor Act does not, however, provide explicitly for intervention at the appellate court level. Section 10 (f) of the Act,

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[1] Section 1254 (1), 62 Stat. 928, 28 U. S. C. § 1254 (1) (1958), provides:

". . . cases in the courts of appeals may be reviewed by the Supreme Court:

"(1) By writ of certiorari granted upon the petition of any party to any civil . . . case before or after rendition of judgment or decree."

29 U. S. C. § 160 (f), serves as our guide, even though it is silent on the intervention problem. It states, in pertinent part:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside."

Similarly, no specific standards govern the propriety of intervention in Labor Board review proceedings. The Rules of the Courts of Appeals typically provide: "A person desiring to intervene in a case where the applicable statute does not provide for intervention shall file with the court and serve upon all parties a motion for leave to intervene."[2]

Lacking a clear directive on the subject, we look to the statutory design of the Act. Cf. *Scripps-Howard Radio* v. *Commission*, 316 U. S. 4, 11. Of course, in considering the propriety of intervention in the Circuit Courts, our discussion is limited to Labor Board review proceedings. Federal agencies are not fungibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency.

In some instances, the words of the statute themselves elicit an answer. When the Board enters a final order

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[2] Second Circuit Rule 13 (f); Seventh Circuit Rule 14 (f). The other circuits which provide for intervention have substantively identical rules: First Circuit Rule 16 (6); Third Circuit Rule 18 (6); Fourth Circuit Rule 27 (6); Sixth Circuit Rule 13 (6); Eighth Circuit Rule 27 (f); Ninth Circuit Rule 34 (6); Tenth Circuit Rule 34 (6); District of Columbia Rule 38 (f).

against the charged party, it is clear that the phrase "any person aggrieved" in § 10 (f) enables him to seek immediate review in the appropriate Court of Appeals. Alternatively, if the Board determines that a complaint should be dismissed, the charging party has a statutory right to review as a "person aggrieved." A hybrid situation occurs when the Board dismisses certain portions of the complaint and issues an order on others. As to that portion which results in a remedial order against him, the charged party is aggrieved; likewise, the charging party is aggrieved with respect to the portion of the decision dismissing the complaint. Each one is a "party" in a consolidated appeal, and has invariably been granted leave to intervene to the portion of the order on which the Board found in his favor.[3]

Scofield serves as an example of another variant in review proceedings. The unsuccessful charging party to the Board proceedings petitioned for review, and the successful charged party wished to intervene. The vast majority of the courts have recognized his right to do so.[4]

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[3] *Darlington Mfg. Co.* v. *Labor Board*, 325 F. 2d 682 (C. A. 4th Cir.), vacated and remanded on other grounds *sub nom. Textile Workers* v. *Darlington Co.*, 380 U. S. 263; *Industrial Union of Marine & Shipbuilding Workers* v. *Labor Board*, 320 F. 2d 615 (C. A. 3d Cir.); *Labor Board* v. *Wooster Div. of Borg-Warner Corp.*, 236 F. 2d 898 (C. A. 6th Cir.); see also *American Newspaper Publishers Assn.* v. *Labor Board*, 190 F. 2d 45 (C. A. 7th Cir.).

[4] *Steelworkers* v. *Labor Board*, 311 F. 2d 135 (C. A. 2d Cir.), reversed on other grounds, 376 U. S. 492; *Local 1441, Retail Clerks International Assn.* v. *Labor Board*, 326 F. 2d 663 (C. A. D. C. Cir.); *Amalgamated Clothing Workers of America* v. *Labor Board*, 324 F. 2d 228 (C. A. 2d Cir.); *Minnesota Milk Co.* v. *Labor Board*, 314 F. 2d 761 (C. A. 8th Cir.); *Great Western Broadcasting Corp.* v. *Labor Board*, 310 F. 2d 591 (C. A. 9th Cir.); *Selby-Battersby & Co.* v. *Labor Board*, 259 F. 2d 151 (C. A. 4th Cir.); *Kovach* v. *Labor Board*, 229 F. 2d 138 (C. A. 7th Cir.). Contra, *Superior Derrick Corp.* v. *Labor Board*, 273 F. 2d 891 (C. A. 5th Cir.), cert. denied, 364 U. S. 816; *Amalgamated Meat Store, Inc.* v. *Labor*

Recognition of intervention rights in this instance is in complete accord with the statements in *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 369, 373, that:

> "While § 10 (f) assures to any aggrieved person the opportunity to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. . . .
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> . . . . . .
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> "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity power, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements. . . ."

To allow intervention to the charged party in the first appellate review proceeding is to avoid "unnecessary duplication of proceedings," and to adhere to the goal of obtaining "a just result with a minimum of technical requirements." Analysis of the Act's machinery in practice so indicates. A decision of the reviewing court to set aside a Board order dismissing a complaint has the effect of returning the case to the Board for further proceedings. This normally results in the Board entering an order against the charged party. From this remedial order, as noted, the charged party is aggrieved and may

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Board, 267 F. 2d 169 (C. A. 1st Cir.), cert. denied, 361 U. S. 183; *Haleston Drug Store, Inc.* v. *Labor Board*, 190 F. 2d 1022 (C. A. 9th Cir.).

seek review. Judicial time and energy is then expended in pursuit of issues already resolved in the first appeal.[5] Moreover, the second appeal could lead to undesirable "circuit shopping" and useless proliferation of judicial effort. Under § 10 (f), an aggrieved person has the option of obtaining review either in the circuit in which he maintains his residence or place of business or in the Court of Appeals for the District of Columbia Circuit. In the second appellate proceeding, he could obtain a hearing in the circuit which did not originally decide the validity of the Board's dismissal of the complaint. Permitting intervention in the first review thus centralizes the controversy and limits it to a single decision, accelerating final resolution. This is in accord with one of the objectives of the Labor Act—the prompt determination of labor disputes.

Permitting intervention also insures fairness to the would-be intervenor. If intervention is permitted, the parties to the Board proceedings are able to present their arguments on the issues to a reviewing court which has

[5] There are, of course, cases in which the Court of Appeals will remand to the Board to take additional evidence or to reconsider the order in light of litigational developments. In these cases, there is a greater opportunity for the party originally victorious before the Board successfully to persuade it or the appellate court than in the case in which no additional evidence need be taken. Still, the considerations discussed herein strongly suggest the propriety of intervention in these cases as well, especially since, at the time a motion for leave to intervene is filed, the reviewing court will not be fully apprised of the issues involved in the case.

Then, too, only 12 proceedings in which the Board had entered an order dismissing the complaint and the charging party appealed the dismissal in the Court of Appeals occurred during the 1964 fiscal year. See 29th Ann. Rpt. of the NLRB, p. 201 (Table 19) (1965). In eight of these, the Board orders were affirmed in full. *Ibid.* The small caseload gives further support for the notion that the circuit courts, and the Board, will not be disadvantaged by allowing intervention to the charged party.

not crystallized its views. To be sure, if intervention is denied in the initial review proceeding, the charged party would not be bound by the decision under technical *res judicata* rules. Still, the salient facts having been resolved and the legal problems answered in this initial review, subsequent litigation serves little practical value to the potential intervenor. In the second appellate proceeding, the Court of Appeals would almost invariably defer to the initial decision as a matter of *stare decisis* or of comity.[6] See, *e. g.*, *Amalgamated Clothing Workers of America* v. *Labor Board*, 340 F. 2d 309; *Zdanok* v. *Glidden*, 327 F. 2d 944, 949–950, cert. denied, 377 U. S. 934.

Allowing intervention does not affect the discretionary review powers of this Court. One occupying the status of intervenor in the Court of Appeals proceeding may seek certiorari from the decision there, *Steelworkers* v. *Labor Board*, 373 U. S. 908, 376 U. S. 492; *Mine Workers* v. *Eagle-Picher Co.*, 325 U. S. 335, 338–339. Denial of intervention in the initial review proceedings—and the attendant remand to the Board and second appeal to the Court of Appeals—only results in a delay of the time when the disaffected party may seek review here. Should we decide to grant certiorari, the first review would seem

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[6] In the rare instance in which the reviewing court does not abide by these principles, an even more aggravated situation could result. In the second review proceeding, if the now-successful charging party is denied intervention and the appellate court takes a different view of the applicable law, the charging party might later have the opportunity to seek review again as a "person aggrieved." Thus, three or even more review proceedings could be engendered out of the failure to permit intervention at the most convenient stage—the initial review proceeding. Such an incongruous result should not be sanctioned in light of our statement in *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 370, that although "there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned."

the more propitious time, since all the parties are then before the Court and the dispute has been fully developed without inconvenience to either private party. *Steelworkers* v. *Labor Board*, 376 U. S. 492, affords an apt illustration. The Court of Appeals had permitted intervention to the charged party who sought review from the adverse decision there. We reversed unanimously. The Board itself had not sought certiorari because "the Solicitor General concluded that other cases were entitled to priority in selecting the number of cases which the government [could] properly ask this Court to review." Memorandum for the NLRB, p. 2, filed in connection with the petition for certiorari, No. 89, October Term, 1963. Had the charged party been denied intervention in the Court of Appeals, the decision of the Government not to apply for certiorari—unrelated to the merits of the cause—would have unnecessarily postponed resolution on that important issue.[7]

In fact, the Labor Board itself agrees that intervention by charged parties will not impair effective discharge of its duties and may well promote the public interest. The rights typically secured to an intervenor in a reviewing court—to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari—are neither productive of delay nor do they cause complications in the appellate courts. Appellate records in Labor Board cases

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[7] The Labor Board may also adversely affect the rights of the private parties in other instances. For example, the Board may decide a case and later re-evaluate its position at a time when that case is before an appellate court. The General Counsel, in such a situation, cannot be expected wholeheartedly to attempt to convince an appellate court of the correctness of a doctrine which the Board itself has abandoned.

are generally complete, and whatever material the charged party may see fit to add to the appendix will not affect the burden in preparation. Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful. The charged party is usually accorded the right as an *amicus* to file a brief on the merits even if denied intervention. Participation in oral argument does not necessarily enlarge the total time allocated, since parties aligned on the same side are usually required to share the time.[8] And, as noted, petitioning for certiorari at this time has the salutary effect of insuring prompt adjudication. Further, if a charged party permitted to intervene decides to acquiesce in the decision or if certiorari is denied by this Court, it is likely that he will then stipulate to the entry of an order against him. This would obviate the need for supplemental agency or court proceedings. On the other hand, an *amicus*—with the exception of the right to file a brief—might be unable adequately to present all the relevant data to the court.

Finally, an element of fortuity would be injected by the denial of intervention to a successful party in the Board proceedings. When the charged party loses before the Board, he is accorded a statutory right to immediate review and may seek or oppose this Court's ultimate review of the case. If he prevails at the agency level, however, denial of intervention deprives him of the rights accorded a losing party, even though the issue before the

[8] First Circuit Rule 28 (3); Second Circuit Rule 23 (c); Third Circuit Rule 31 (3); Fourth Circuit Rule 15 (3); Fifth Circuit Rule 25 (3); Sixth Circuit Rule 20 (3); Seventh Circuit Rule 21 (b); Eighth Circuit Rule 13 (c); Ninth Circuit Rule 20 (3); Tenth Circuit Rule 20 (3); District of Columbia Rule 19 (c).

Additionally, all the circuits have rules which permit the court to increase the time for oral argument upon a showing of good cause.

reviewing court is identical—whether a remedial order should have been entered against the charged party. These considerations lead us to the assumption that Congress would not intend, without clearly expressing a view to the contrary, that a party should suffer by his own success before the agency.

Additionally, helpful analogies may be found in the Judicial Review Act of 1950, governing intervention in the Courts of Appeals by private parties directly affected by agency orders,[9] and in the Federal Rules of Civil Procedure.[10] We take these provisions to mean that Congress has exhibited a concern that interested private parties be given a right to intervene and participate in the review proceedings involving the specified agency and its orders.

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[9] Review of Commission orders in general is governed by the provisions of the Judicial Review Act of 1950 (the Hobbs Act), 5 U. S. C. §§ 1031–1042 (1958). The provision regarding appellate court intervention, 5 U. S. C. § 1038, provides as follows:

"The Attorney General shall be responsible for and have charge and control of the interests of the Government in all court proceedings authorized by this chapter. The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto on their own motion and as of right, and be represented by counsel in any proceeding to review such order . . . ."

[10] The Federal Rules of Civil Procedure, of course, apply only in the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts. Under Rule 24 (a) (2) or Rule 24 (b) (2), we think the charged party would be entitled to intervene. See *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 505–506; *Textile Workers Union of America* v. *Allendale*, 226 F. 2d 765, 767–768 (C. A. D. C. Cir.).

The Advisory Panel on Labor-Management Relations Law issued a report, S. Doc. No. 81, 86th Cong., 2d Sess. (1960), which contained a statement of policy that "any party to NLRB proceedings should be allowed to intervene in the appellate proceedings," p. 17.

II.

The problem of whether intervention should be granted to the successful charging party to the Labor Board proceedings presents considerations somewhat distinct from the case of the intervening charged party. Resolution of the problem is no easy matter, and it is understandable that the courts have divided on the issue.[11] Still, we believe that Congress intended intervention rights to obtain.

The Board opposes intervention in *Fafnir*. A charged party may incur a liability on account of an order being entered against him. Fairness to him thus requires that he be allowed to intervene to preclude that possibility. On the other hand, the Board reasons, the charging party stands only to become a beneficiary of an order entered.[12] As such, he is but another member of the public whose interests the Board is designed to serve. The Labor Board is said to be the custodian of the "public interest," to the exclusion of the so-called "private interests" at

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[11] The cases which have permitted intervention usually have not discussed the question, *e. g.*, *Labor Board* v. *Johnson*, 322 F. 2d 216 (C. A. 6th Cir.); *Kearney & Trecker Corp.* v. *Labor Board*, 210 F. 2d 852 (C. A. 7th Cir.), cert. denied *sub nom. Kearney-Trecker Employees, UAW* v. *Labor Board*, 348 U. S. 824; *West Texas Utilities Co.* v. *Labor Board*, 184 F. 2d 233 (C. A. D. C. Cir.), cert. denied, 341 U. S. 939. Contra, *Labor Board* v. *Retail Clerks Assn.*, 243 F. 2d 777, 783 (C. A. 9th Cir.); *Steward Die Casting Corp.* v. *Labor Board*, 132 F. 2d 801 (C. A. 7th Cir.); *Aluminum Ore Co.* v. *Labor Board*, 131 F. 2d 485, 488 (C. A. 7th Cir.).

[12] Cf. Hart and Wechsler, The Federal Courts and The Federal System, 326 (1953):

"Haven't you noticed how frequently the protected groups in an administrative program pay for their protection by a sacrifice of procedural and litigating rights? The agency becomes their champion and they stand or fall by it. Does this phenomenon reflect a disregard or a recognition of the equities of the situation?"

See also Jaffe, The Public Right Dogma in Labor Cases, 59 Harv. L. Rev. 720 (1946).

stake. Support for this view is claimed to be found in our decision in *Amalgamated Util. Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 (1940). Also, the Board fears that enabling the intervenor to petition for certiorari from an adverse circuit decision will be inimical to the public interest. We disagree.

In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme.[13] These cases have, to be sure, emphasized the "public interest" factor. To employ the rhetoric of "public interest," however, is not to imply that the public right excludes recognition of parochial private interests. A perusal of the statutory scheme and of the Board's Rules and Regulations is illustrative.

The statutory machinery begins with the filing of an unfair labor practice charge by a private person, § 10 (b); see also, 24 Fed. Reg. 9102 (1959), 29 CFR § 102.9 (1965). When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition: he participates in the hearings as a "party";[14] he may

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[13] *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 258; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194; *Nathanson* v. *Labor Board*, 344 U. S. 25, 27; *Smith* v. *Evening News Assn.*, 371 U. S. 195. See Jaffe, The Individual Right to Initiate Administrative Process, 25 Iowa L. Rev. 485, 528–531 (1940).

[14] The NLRB Rules and Regulations and Statements of Procedure, 29 CFR § 102.8 (1965), afford the charging party this status. The section provides as follows:

"The term 'party' as used herein shall mean . . . any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, *any person filing a charge* or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act. . . ." (Emphasis added.)

call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a petition for reconsideration to a Board order, 28 Fed. Reg. 7973 (1963), as amended, 29 CFR § 102.46 (1965). Of course, if the Board dismisses the complaint, he can obtain review as a person aggrieved, which serves the "public interest" by guaranteeing that the Board interpretation of the relevant provisions accords with the intent of Congress.[15]

And that the charging party may have vital "private rights" in the Board proceeding is clear in this very case, which also involves, potentially, a breach of the parties' collective bargaining agreement.[16] Under our decisions in the *Steelworkers Trilogy*, 363 U. S. 564, and *Carey* v. *Westinghouse Corp.*, 375 U. S. 261, the Union could take whatever contractual claim it had to arbitration and from there to a federal court. And while it is true

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[15] For an analysis of the rights of a charging party before the Board, see Comment, 32 U. Chi. L. Rev. 786 (1965). Of course, the considerations involved in determining whether the charging party has certain rights before the Board are not dispositive on the question of appellate intervention. In the first place, the need for centralized control over the agency hearings and the standards under which they operate is much greater at the administrative than the appellate level, where perforce an adequate record has been made for adjudication. Also, the statistics of the NLRB reveal that over 97% of the unfair labor practice charges are resolved before the circuit court has entered a decree. 29th Ann. Rpt. of the NLRB, pp. 178–179 (Table 7) (1965). This winnowing process diminishes once a case is lodged in the circuit court and falls within our supervisory power over the federal courts. Then, too, manpower and budgetary considerations are of great concern at the administrative level. These factors are not nearly as great when a labor dispute reaches the appellate courts since the Board will invariably appear to defend its order.

[16] In the Board's opinion in *Fafnir*, the charging party's interests were referred to a dozen times as a statutory right of the "private party," 146 N. L. R. B., at 1585–1587.

that the rights and duties under § 301 (a) of the Labor Act are not coextensive with those redressed in Labor Board proceedings, a determination by an appellate court that the Union has no statutory right to conduct its own time studies will surely have an impact upon a later decision by an arbitrator or an appellate court under § 301 (a) on the contractual issue.

In short, we think that the statutory pattern of the Labor Act does not dichotomize "public" as opposed to "private" interests. Rather, the two interblend in the intricate statutory scheme.[17] Nor do we think that our holding in *Amalgamated Util. Workers*, 309 U. S. 261, casts doubt on these notions. The Court there held that private parties who initiated unfair labor practice charges may not prosecute a contempt action against the charged party in the court which enforces the Labor Board order.[18] In the same case, the private parties had been permitted to intervene in the Court of Appeals when the merits of the Board's decision were at stake, 309 U. S., at 263. We find nothing inconsistent in denying the right of a private

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[17] See *Retail Clerks Local 137* v. *Food Employers Council, Inc.*, — F. 2d —.

[18] The Court placed great weight upon the language and legislative history behind § 10 (a), as it read at that time:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive*, and shall not be affected by any other means of adjustment or prevention that has been or may be stablished by agreement, code, law, or otherwise." (Emphasis added.)

The italicized portion of § 10 (a) was deleted in the Taft-Hartley amendments to the Wagner Act in 1947, when Congress added the union unfair labor practice provisions and enacted § 301 (a). While it is true that the Labor Board does not confer a private administrative remedy, it is equally true that, since 1947, it serves substantially as an organ for adjudicating private disputes. See Report of the Advisory Panel on Labor Management Relations Law, *supra*, n. 10, p. 5.

party to institute a contempt proceeding—where the Board's expertness in achieving compliance with orders is challenged—and on the other hand, in permitting intervention in a proceeding already in the court for decision. When the court is to rule on the merits of the Board's order, the Act supports the view that it is the court and not the agency which will define the public interest, see § 10 (d), *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364.

The Board also argues that permitting intervention will adversely affect its tactical or budgetary decision not to bring a case here for review. But the opportunity is open to the Board to advise this Court whether a case that the intervening charging party brings here is an appropriate vehicle to raise important issues. And Congress has entrusted to this Court, rather than the Labor Board, discretionary jurisdiction to review cases decided by the Courts of Appeals.[19]

Many of the considerations which favor intervention in *Scofield* are also pertinent here.[20] Of special note is the capriciousness we would have to ascribe to Congress in refusing to afford the successful party to a Labor Board proceeding an opportunity tantamount to that of the unsuccessful party in persuading an appellate court. The charging party, like the charged party, should not be prejudiced by his success before the agency. Accordingly, we reverse both cases and remand them to the respective courts for further proceedings.

It is so ordered.

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[19] The Board also claims that the charging party, if permitted to intervene, will be able to thwart proposed settlements between the Board and the charged party when the case is in the appellate court. Nothing in the record indicates that this will be the consequence of allowing intervention and we intimate no view on the question.

[20] As in the case of the charged party, disallowing intervention could lead to duplicity in appellate review, "circuit shopping," unfairness to the successful party to the Board proceedings, etc.